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NORTH CAROLINA REPORTS

VOL. 10

CASES ARGUED AND ADJUDGED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

DURING THE YEARS 1824 AND 1825

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7 Iredell Equity	" 42 "
8 Iredell Equity	" 43 "
Busbee Law	" 44 "
Busbee Equity	" 45 "
1 Jones Law	" 46 "
2 Jones Law	" 47 "
3 Jones Law	" 48 "
4 Jones Law	" 49 "
5 Jones Law	" 50 "
6 Jones Law	" 51 "
7 Jones Law	" 52 "
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1 Jones Equity	" 54 "
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OF THE

SUPREME COURT OF NORTH CAROLINA

DURING THE TIME OF THIS VOLUME

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ASSOCIATE JUDGES:

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OF THE

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John R. Donnell	Craven
William Norwood	Orange
George E. Badger	Wake
*Thomas Ruffin	Orange
Joseph J. Daniel	Halifax

---

*Appointed in 1825 to succeed Badger, resigned.

CASES REPORTED

A

PAGE

Adam, S. v........ 188
Alexander, McRee v........ 322
Allen, S v........ 614
Anderson v. Hawkins........ 568
Anderson v. Hunt........ 244
Armfield, Lindsay v........ 548
Armis, Smith v........ 469
Arnold, Beckerdite v........ 296
Arrington v. Short........ 71
Averitt, Williams v........ 308
Ayres v. Parks........ 59

B

Bain v. Hunt........ 572
Ballew, Nesbitt v........ 57
Bank of U. S. v. Lane........ 453
Bank v. Sneed........ 500
Beckerdite v. Arnold........ 296
Bizzell, Grantham v........ 196
Blount, Clarke v........ 208
Bond, Inge v........ 101
Bowen, Latham v........ 418
Boyd v. Carson........ 626
Bradley, Morgan v........ 559
Bradley, Pope v........ 14
Bradshaw, Kincade v........ 63
Brittain, Tate v........ 55
Brittain v. Israel........ 222
Brown, Smith v........ 580
Bullock, Wood v........ 298
Bunting, Nichols v........ 86
Burgwin v. Richardson........ 202
Byers, Worke v........ 228

C

Candler, S. v........ 933
Cameron v. Campbell........ 285
Campbell, Smith v........ 590
Carson, Boyd v........ 626
Carter, Governor v........ 328
Chambers v. Chambers........ 232
Clarke v. Blount........ 208
Clarke v. Shields........ 461
Coffield, Wilkes v........ 28
Coleman v. Coleman........ 200
Coleman, Yo-na-gus-kee v........ 174
Collins v. Jones........ 25

PAGE

Collins, McGowan v........ 420
Collins, S. v........ 191
Coltraine, Harris v........ 312
Comrs. v. Holloway........ 234
Cooke, Davis v........ 608
Cooper, Ricks v........ 587

D

Daniel, S. v........ 617
Davis, Pigot v........ 25
Davis v. Cooke........ 608
Deloach v. Worke........ 36
Devereux v. Marsoratti........ 336
Dickerson, Gilkey v........ 293
Dortch, Hilliard v........ 246

E

Edmunds, Freeman v........ 5
Edwin v. Kilpatrick........ 456
Eu-chu-lah v. Welsh........ 155
Ex parte Thompson........ 364

F

Fewell, Scales v........ 18
Fields v. Mallett........ 465
Finley, Gordon v........ 239
Forte, White v........ 251
Foscue v. Foscue........ 538
Franklin v. Terrell........ 283
Free Jack v. Woodruff........ 106
Freeman v. Edmunds........ 5

G

Galloway, Wingate v........ 6
Gheen, Plummer v........ 66
Gilkey v. Dickerson........ 293
Goodloe v. Taylor........ 458
Gordon v. Finley........ 239
Governor v. Carter........ 328
Governor v. Judge........ 463
Governor v. McRae........ 226
Governor v. Witherspoon........ 42
Grantham v. Bizzell........ 196
Grayton, S. v........ 187
Greenlee, Walker v........ 281

CASES REPORTED.

H

PAGE

Hargrove, Smith v. 560
Harrell, Medford v. 41
Harris, Jeffreys v. 105
Harris v. Coltraine 312
Hart v. Lenier 244
Hart v. Newland 122
Haughton v. Rascoe 21
Hawkins, Anderson v. 568
Hawkins v. Sneed 149
Hawkins, Wilcox v. 84
Helme v. Saunders 563
Hightower, Wilson v. 76
Hilliard v. Dortch 246
Hodges v. McCabe 78
Hodges, Thompson v. 51, 318
Holliday v. Porter 198
Holloway, Comrs. v. 234
Hooks, Molton v. 342
Hunt, Anderson v. 244
Hunt, Bain v. 572
Hunter, Williams v. 545

I

Inge v. Bond 101
Isham, S. v. 185
Israel, Brittain v. 222

J

James, Jordan v. 110
Jarvis v. McMain 10
Jeffreys v. Harris 105
Johnson, Randolph v. 238
Johnson v. Johnson 556
Jones, Collins v. 25
Jones, Ryden v. 24
Jones, Streator v. 423
Jordan v. James 110
Joyney, Price v. 418
Judge, Governor v. 463

K

Kilpatrick, Edwin v. 456
Kincade v. Bradshaw 63

L

Lamon, S. v. 175
Lane, Bank of U. S. v. 453
Langford, S. v. 381
Langley v. Lane 313
Latham v. Bowen 418
Lenier, Hart v. 244

PAGE

Lewis, S. v. 410
Linville, Studdard v. 474
Lindsay v. Armfield 548
Little v. May 599
Logan, Tyrrell v. 319
Love, Robbins v. 82

M

Mallett, Fields v. 465
Marsoratti, Devereux v. 336
Massey, McNeill v. 91
May, Little v. 599
McCabe, Hodges v. 78
McDuffy, Moore v. 578
McGowan v. Collins 420
McMain, Jarvis v. 10
McNeill v. Massey 91
McNeill, S. v. 183
McRae, Governor v. 226
McRee v. Alexander 322
Medford v. Harrell 41
Miller, Prater v. 628
Molton v. Hooks 342
Molton v. Mumford 483
Molton v. Mumford 490
Moore v. McDuffy 578
Mordecai v. Olive 479
Morgan v. Bradley 559
Morris, S. v. 388
Mumford, Molton v. 483
Mumford, Molton v. 490

N

Navigation Co. v. Neal 520
Nesbitt v. Ballew 57
Newland, Hart v. 122
Nichols v. Bunting 86

O

Olive, Mordecai v. 479

P

Parkes, Wade v. 200
Parks, Ayres v. 59
Parsley, Taylor v. 125
Perkins, S. v. 377
Pettaway, S. v. 623
Pigot v. Davis 25
Plummer v. Gheen 66
Pope v. Bradley 14
Porter, Holliday v. 198

CASES REPORTED.

	PAGE
Powers, S. v.	376
Prater v. Miller	628
Price v. Joyney	418
R	
Rainey, Williamson v.	9
Randolph v. Johnson	238
Rascoe, Haughton v.	21
Richardson, Burgwin v.	202
Ricks v. Cooper	587
Robbins v. Love	82
Rout, S. v.	618
Rutherford v. Wolfe	271
Ryden v. Jones	24
S	
Saunders, Helme v.	563
Scales v. Fewell	18
Seawell, S. v.	196
Sexton, S. v.	184
Shields, Clarke v.	461
Short, Arrington v.	71
Simpson, S. v.	620
Slaughter, Wilkes v.	211
Smith, S. v.	378
Smith v. Armis	469
Smith v. Brown	580
Smith v. Campbell	590
Smith v. Hargrove	560
Sneed, Bank v.	500
Sneed, Hawkins v.	149
Southard, Tate v.	119
Stowe v. Ward	604
Streator v. Jones	423
Studdard v. Linville	474
S. v. Adam	188
S. v. Allen	614
S. v. Candler	933
S. v. Collins	191
S. v. Daniel	617
S. v. Grayton	187
S. v. Isham	185
S. v. Lamon	175
S. v. Langford	381
S. v. Lewis	410
S. v. McNeill	183
S. v. Morris	388
S. v. Perkins	377
S. v. Pettaway	623
S. v. Powers	376

	PAGE
S. v. Rout	618
S. v. Seawell	196
S. v. Sexton	184
S. v. Simpson	620
S. v. Smith	378
S. v. Thompson	613
S. v. Welsh	404
S. v. Woodman	384
T	
Tate v. Brittain	55
Tate v. Southard	119
Taylor, Goodloe v.	458
Taylor v. Parsley	125
Terrell, Franklin v.	283
Thompson *ex parte*	364
Thompson, S. v.	613
Thompson v. Hodges	51, 318
Tolar v. Tolar	74
Twitty, Wilson v.	44
Tyrrell v. Logan	319
W	
Wade v. Parkes	200
Walker v. Greenlee	281
Ward, Stowe v.	604
Welsh, Eu-chu-lah v.	155
Welsh, S. v.	404
Wellborn v. Younger	205
White v. Forte	251
Wilcox v. Hawkins	84
Wilkes v. Coffield	28
Wilkes v. Slaughter	211
Williamson v. Rainey	9
Williams v. Averitt	308
Williams v. Hunter	545
Wilson v. Hightower	76
Wilson v. Twitty	44
Wingate v. Galloway	6
Witherspoon, Governor v.	42
Wolfe, Rutherford v.	271
Woodman, S. v.	384
Woodruff, Free Jack v.	106
Wood v. Bullock	298
Worke v. Byers	228
Worke, Deloach v.	36
Y	
Yo-na-gus-kee v. Coleman	174
Younger, Wellborn v.	205

CASES CITED

A

Adam, S. v.	10 N. C., 188	616, 617
Albertson v. Reding	4 N. C., 28; 6 N. C., 251	482
Armstrong v. Wright	8 N. C., 93	311
Arnold v. Clement	4 N. C., 143	498
Arnold v. Lanier	4 N. C., 143	565

B

Bank v. Smith	7 N. C., 73	15
Bank v. Twitty	9 N. C., 5	43
Beard, Davidson v.	9 N. C., 520	56
Brocket v. Foscue	8 N. C., 64	472
Bunting, Nichols v.	10 N. C., 86	560
Burton v. Dickens	7 N. C., 103	116

C

Clement, Arnold v.	4 N. C., 143	498

D

Davidson v. Beard	9 N C., 520	56
Dickens, Burton v.	7 N. C., 103	116
Dusenberry, Hargrove v.	9 N. C., 326	472, 571

F

Fewell, Scales v.	8 N. C., 18	24
Fite, Parish v.	6 N. C., 258	311
Forsythe v. Sykes	9 N. C., 54	465
Foscue, Brocket v.	8 N. C., 64	472
Frion, Riden v.	7 N. C., 577	611

G

Goodbread, Kelly v.	4 N. C., 468	310, 311
Graham v. Graham	9 N. C., 322	544
Grayton, S. v.	10 N. C., 187	187

H

Hafley, McMillan v.	4 N. C., 186	82
Hamilton v. McCulloch	9 N. C., 29	244
Hargrove v. Dusenberry	9 N. C., 326	472, 571
Harrington, Scroter v.	8 N. C., 192	232
Hill, Taggert v.	3 N. C., 86	8
Holtsclaw, U. S. v.	3 N. C., 379	404

I

Isham, S. v.	10 N. C., 185	190

CASES CITED.

J

Jones v. Jones	6 N. C., 150	77, 78
Jones, Riden v.	8 N. C., 497	24
Jones, Streator v.	5 N. C., 449	432, 443
Jones, Streator v.	10 N. C., 423	587

K

Kelly v. Goodbread	4 N. C., 468	310, 311
King, Sacarusa v.	4 N. C., 336	132

L

Lanier, Arnold v.	4 N. C., 143	565
Lanier v. Stone	8 N. C., 229	465

M

Mangum v. Sims	4 N. C., 160	244
McCulloch, Hamilton v.	9 N. C., 29	244
McEntire, S. v.	4 N. C., 267	179
McMillan v. Hafley	4 N. C., 186	82

N

Nichols v. Bunting	10 N. C., 86	560

P

Parish v. Fite	6 N. C., 258	311
Potter, Tims v.	1 N. C., 12	458
Pritchard, Whitehead v.	5 N. C., 382	606

R

Reding, Albertson v.	4 N. C., 28; 6 N. C., 251	482
Rhodes v. Vaughan	9 N. C., 157	347
Riden v. Frion	7 N. C., 577	611
Riden v. Jones	8 N. C., 497	24

S

Sacarusa v. King	4 N. C., 336	132
Scales v. Fewell	8 N. C., 18	24
Scroter v. Harrington	8 N. C., 192	232
Sheriff, Tuton v.	2 N. C., 485	246
Sims, Mangum v.	4 N. C., 160	244
Smith, Bank v.	7 N. C., 73	15
Smith, Wagstaff v.	9 N. C., 45	211
Stone, Lanier v.	8 N. C., 229	465
Streator v. Jones	5 N. C., 449	432, 443
Streator v. Jones	10 N. C., 423	587
S. v. Adam	10 N. C., 188	616, 617
S. v. Grayton	10 N. C., 187	187
S. v. Isham	10 N. C., 185	190
S. v. McEntire	4 N. C., 267	179
Sykes, Forsythe v.	9 N. C., 54	465

T

Taggert v. Hill .... 3 N. C., 86 8
Tims v. Potter .... 1 N. C., 12 458
Tuton v. Sheriff .... 2 N. C., 485 246
Twitty, Bank v. .... 9 N. C., 5 43

U

United States v. Holtsclaw .... 3 N. C., 379 404

V

Vaughan, Rhodes v. .... 9 N. C., 157 347

W

Wagstaff v. Smith .... 9 N. C., 45 211
Whitehead v. Pritchard .... 5 N. C., 382 606
Winstead v. Winstead .... 2 N. C., 243 79
Wright, Armstrong v. .... 8 N. C., 93 311

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

JUNE TERM, 1824

DOE on Demise of FREEMAN v. EDMUNDS.—From Northampton.

When a Superior Court is requested to instruct a jury on a point relative to which no testimony was offered, and declines to do so, it furnishes no ground for a new trial.

Ejectment to recover a tract of land formerly owned by one Charles Edmunds, under whom both plaintiff and defendant claimed.

On 29 November, 1817, Edmunds conveyed the lands in dispute, together with certain negroes, to Freeman, in trust for the benefit of the creditors of the grantor. The deed contained the usual power to the trustee to sell.

The defendant claimed title under a sheriff's deed for the land in dispute, dated 25 February, 1818, which was made by virtue of an execution against Charles Edmunds, issuing from Northampton County court, December Term, 1817. The defendant exhibited, also, in evidence three executions against Charles Edmunds, issuing (6) September Term, 1817, of Northampton County court, returned to the next December Term, with an indorsement of a levy on some of the negroes named in the deed of trust; alias writs of *fi. fa.* issued from December Term, 1817, and at March Term, 1818, were returned with the sheriff's indorsement that they were satisfied by a sale of the negroes, and that the sum remaining in his hands after satisfaction he had paid to the order of Freeman, who claimed it as trustee. The defendant contended that if Freeman had received any portion of the money arising from the sale of the land by the sheriff, that it amounted to a confirmation of the sale, and that he could not recover in this action, and requested that the jury should be so instructed, which the court declined, and the plaintiff had a verdict; new trial refused; judgment and appeal.

PER CURIAM. It cannot be perceived from the case that any evidence was given on the point relative to which the court was asked to instruct the jury. It was an abstract question on which the court could not, properly, give any opinion. Judgment must be

Affirmed.

Cited: S. v. McCurry, 63 N. C., 35.

ADMINISTRATOR OF WINGATE v. GALLOWAY.

An execution not having indorsed thereon the cost in words, at length, is yet good as to everything but costs, and must be obeyed accordingly.

APPEAL from *Norwood, J.*, at NEW HANOVER. Action on the case.

(7) The declaration contained two counts. The first charged that the plaintiff recovered, in NEW HANOVER County court, a judgment against Benjamin Smith, on which a writ of *ca. sa.* issued, directed to the defendant, as sheriff of Brunswick County, who neglected to execute the same, and falsely returned that Benjamin Smith was not to be found in his county.

The second count charged that plaintiff sued out one other writ of *ca. sa.* against Benjamin Smith, directed to the defendant as sheriff of Brunswick County, who, after 15 February, 1821, took and arrested the said Benjamin Smith by virtue thereof, and afterwards, to wit, on 1 May, 1821, suffered the said Benjamin Smith to escape and go at large out of custody, and made a return as follows: "Writ executed by arresting and taking defendant into my custody, who was released upon giving bond and security to comply with the requisitions of the act of 1820, passed for the relief of honest debtors. Bond made returnable in pursuance of said act, to the county court of Brunswick at July Term, 1821."

On the trial below before *Norwood, J.*, the plaintiff offered in evidence a paper purporting to be an execution, at his instance, against Benjamin Smith, on which, among other indorsements, was the following: "Bill of costs: Clerk, $7.68½; tax and duty, $2; sheriff, $1.20; attorney, $4." This was objected to, and rejected by the judge, on the ground that it was not an execution, but void as having no legal bill of costs attached to it. Plaintiff then offered in evidence a preceding execution on the same judgment, and the indorsement of costs thereon was as follows: "Process and bond, $1.60; determination, 75 cents; continuance, 30 cents; tax and duty, $2; sheriff, $1.20; attorney, $4; writ and seal, 63 cents." On this a levy on land was returned by defendant. The court was of opinion that this paper was inadmissible, and could not support the first count in the declaration; and, on the second count, the court held that bond taken by the defendant from Benjamin Smith, was properly made returnable to Brunswick County court, (8) and the plaintiff was nonsuited. The case stood before this Court on a rule for a new trial, and was submitted without argument.

TAYLOR, C. J. The rejection of the execution as evidence proceeded on a misconstruction of the act of 1784, ch. 223, which relates only to executions for costs; and supposing the last sentence of the *eighth* section to require an extended bill of costs to be annexed to all executions, yet it cannot be so construed as to make it illegal *in toto* to execute the writ without it; for, if the execution be sufficient in other respects, the sheriff is bound to obey it, so far as relates to the judgment, exclusive of costs. On this count, therefore, there must be a new trial.

HALL, J. The reason assigned for not executing the writ of execution is that no copy of the bill of costs of the fees in which the execution issued, written at length and without any abbreviations, was annexed to the execution, as the act of 1784, ch. 223, sec. 8, requires. This act was passed for the purpose of ascertaining the fees due to the clerks, sheriffs, and other officers; and that part of it above recited speaks altogether of the costs that may be due, and directs how they shall be made to appear, but is silent as to the execution in other respects. Admitting the execution to be void as to the costs, it ought to have been executed in other respects as if no costs had been due, or as if the bill of costs had been annexed as the law requires. This seems to have been decided to be the construction of the act many years ago. *Taggert v. Hill,* 3 N. C., 86. I, therefore, think a new trial ought to be granted on the first count for not obeying the writ of execution.

And of this opinion was Judge HENDERSON.

PER CURIAM. New trial.

Cited: Coltraine v. McCain, 14 N. C., 312.

(9)

WILLIAMSON v. RAINEY.—From Northampton.

The want of a declaration, when it appears on the record sent up to this Court, is an error which the Court cannot overlook, nor can it be amended or remedied but by consent.

THE plaintiff, as guardian, brought her action against the defendant on his obligation in NORTHAMPTON court, and there obtained judgment for the principal money, with compound interest. Defendant appealed to the Superior Court, and at the time of trial did not appear either in person or by attorney. A judgment was rendered in the Superior Court for the principal money, with compound interest and 4 per cent additional interest on the judgment below from the rendition of the same until the affirmance thereof in the Superior Court.

On the day after the trial the defendant came into court and in his proper person moved the court for a new trial, upon the ground that he was absent when the suit was tried; but he offered no affidavit. The court advised him to employ an attorney, that his motion might be brought before the court properly. This he refused to do, and the court decided that defendant should take nothing by his motion, whereupon he appealed.

The record in this case did not set forth any declaration.

PER CURIAM. This is one of those cases in which it does not appear that any statement was intended to have been made by the judge. We must, therefore, look into the record, and seeing there that no declaration has been filed, it is impossible for us to affirm the judgment. It is an error which we cannot overlook or amend in this Court without consent, and the appellant having waived no advantage which the law gives, we must for this cause reverse the judgment.

Cited: Stewart v. Garland, 23 N. C., 472.

(10)

JARVIS v. McMAIN & SIMMONS.

Days of grace are not to be allowed as between the original parties to a single bill, notwithstanding such paper is made negotiable by statute.

DEBT on the following instrument:

Six months after date we promise to pay Moses Jarvis or order $181.98, for value received.

Witness our hands and seals, New Bern, 4 February, 1823.

J. A. McMAIN. [L. S.]
JOHN SIMMONS. [L. S.]

The writ was issued on 5 August, 1823. Plea, the general issue. Defendant contended on the trial below, before *Daniel, J.*, at CRAVEN, that the writ had issued before the debt was due, as he was entitled to days of grace. The jury found a verdict for the plaintiff, subject to the opinion of the court on the point of law as to days of grace. The court was of opinion that the defendants were not entitled to days of grace as in the case of bills of exchange and promissory notes, and gave judgment accordingly, whereupon defendants appealed.

Gaston for appellant.
Hawks, contra.

HALL, J., delivering the opinion of the Court: The decisions (12) are of modern date that give to promissory notes a right to days of grace. 4 Term, 152. When days of grace originally extended to bills of exchange they were gratuitous. I need not cite authority for this.

In bills of exchange the liability of the parties is created more (13) by the *law merchant* than by the express stipulation of the parties. Then days of grace and other regulations suiting a commercial people grew into use; but where the liabilities of the parties are altogether of their own making (such as when a bond shall become due) it is more difficult to perceive the propriety of altering that contract by law, and saying that although the debtor has agreed to pay on a given day, yet he shall not pay till three days afterwards. To be sure, it has been done in England thirty or forty years ago; but I know of no instance of its having been so decided in this State.

The remark may pass for what it is worth that this note has not been indorsed, before which it bears no resemblance to a bill of exchange. Bur. 676. It is a mere contract, like any other, between the parties.

I think the understanding of people generally is that they must pay on the day designated by the note. I think that a new trial ought not be granted.

HENDERSON, J., concurred.

TAYLOR, C. J., dissenting: I understand it to be conceded on all hands that if the action had been brought in the name of an indorsee

the days of grace would have been allowable, by force of the acts of 1762, giving negotiability to promissory notes, and of 1786, placing single bills on the same footing with promissory notes. But the argument is that neither instrument acquires the qualities of a bill of exchange, nor its effect, until it is indorsed, for then only the resemblance between the two begins, and the observations of *Lord Mansfield* in 2 Bur. are quoted to establish this position. But when these remarks are duly considered it will appear that they have no bearing on the case, and that they were made *diverso intuiti.* There the action was
(14) brought on an inland bill of exchange by the indorsee against the indorser, and the objection on the part of the defendant was that a demand of payment ought to have been made on the drawer, in support of which some cases on promissory notes were cited in which that assertion was made. To show its correctness as to promissory notes, in which the indorser is considered as the drawer, and its incorrectness as to bills of exchange in the case under consideration, it becomes necessary to trace the resemblance between them from its beginning in order to mark with precision the liability of the different parties and thereby to show that a demand upon the drawer of a bill of exchange was unnecessary. But what were the incidents or qualities of a promissory note before indorsement it is perfectly clear that the judge intended to intimate no opinion upon. The form of a declaration on a note made negotiable by the statute when a suit is brought by a payee against the maker removes all doubt on that subject. It is there stated that the maker became liable by reason of the note, and by force of the statute 3 Morgan, 24, 1 Went., 331, showing beyond controversy that if it be negotiable, the statute affects it and impresses it with certain qualities even before it is negotiated; whereas, if it be not a note within the statute, as being payable in anything but money, a consideration must be stated and proved, as in any other common-law assumpsit; for before the statute of 3 and 4 Anne no action could be maintained expressly on a note, even for the payment of money, without declaring on it as a special agreement and setting forth the consideration. 5 Term, 482. The statute seems to have designed to assimilate promissory notes of a certain description to bills of exchange, as far as the different nature of the instrument will admit of it, and I cannot perceive why the days of grace should be allowed as against the indorsee and disallowed as against the payee; why the latter, by force of the general words,
(15) should be considered as transferring the note, subject to an inconvenience on the part of the indorsee which had not attached upon it in the hands of the payee.

This would be my opinion in the absence of any adjudged case, but it is confirmed when the only adjudged case uupon the subject is strictly in point. In *Smith v. Kendall* the action was brought by the payee also, and it was considered so much a matter of course to allow the days of grace upon promissory notes, within the statute, that it was not even questioned; and the only doubt was whether a note payable to A., without adding "to order" or "bearer," was within the statute. That point being ascertained, it resulted at once that the days of grace were allowed against the payee.

The case seems to have undergone much consideration, and satisfies me that the law is so settled in England. If it should be thought that these rules are unfit to be adopted here, where the pursuits of the people are so little commercial, the answer is that a certain portion of the community is as much so as in any other country, and that persons who receive negotiable instruments are bound to ascertain their legal qualities; that we have heretofore borrowed, and daily do borrow, our constructions from the same source; and that it seems too late to object to these customs, their commercial nature, when we have adopted and enforced the very strictest amongst them, viz., that notice of nonpayment of a promissory note shall be given to the indorser within one day (allowing for the days of grace) after the demand has been made upon the drawer; otherwise the indorser is discharged. *Banks v. Smith,* 7 N. C., 73.

(16)

DOE ON DEMISE OF POPE v. BRADLEY.

A sheriff advertised property to be sold on a certain day, and afterwards, recollecting that it was the general election day, made known that he would open the sale for form and postpone it to the succeeding day. He did so, and in a contest between a bidder of the first and a bidder of the second day, it was *Held*, that the sheriff might well postpone the sale, as by the act of 1820 he is permitted to do so, and the reasons for a postponement must, to a certain extent, be judged of by the sheriff.

EJECTMENT for a lot of ground, tried, before *Paxton, J.,* at PITT. The lessor of the plaintiff and the defendant both claimed title to the land in dispute, under deeds from the sheriff of the county of Edgecombe on the same execution. The defendant's deed bore date 27 July, 1821, and that of plaintiff's lessor on 27 November, 1821.

The lot in question, with other tract of land, was levied upon by the sheriff as the property of Willie Stanton, and duly advertised to be sold on the last Thursday of July. The sheriff, having afterwards called to mind that the day appointed for the sale was the general election day for the county, caused it to be generally made known that the sale would not actually be made on that day, though it would be opened for form and postponed to the succeeding day. Accordingly on the day the sheriff's deputy announced that he would set up the property, open the bidding, and adjourn the sale to the next day; the tract of land, not the lot in dispute, was set up, and after some bidding the lessor of the plaintiff bid $800, and the deputy sheriff then adjourned the sale to the succeeding day. This took place before 2 o'clock in the afternoon. (17) On the next day the sheriff offered to put up the tract at the last bid which had been made on the day before, viz., $800, when the lessor of the plaintiff objected, alleging that he was the purchaser for the price of $800, which sum he then offered to pay. The sheriff set up the tract anew, and after that was disposed of at $500, offered the lot in question, when it was bid off by an agent of the defendant, and the sheriff immediately executed a deed. The defendant and his agent both knew the circumstances of the bidding on the preceding day and the postponement of the sale.

The court instructed the jury that if there was no fraud in the transaction the deed transferred the title, notwithstanding the provisions of the act of 1820, entitled "an act directing the manner in which property levied on by sheriffs and constables shall be sold."* Verdict for the defendant; new trial refused; judgment, and appeal.

TAYLOR, C. J. The act of 1820 is directory to sheriffs as to the mode of conducting sales, and authorizes them to continue the sale from day to day if the whole of the property taken in execution cannot be sold the same day. But as it does not specify the reasons which may prevent a sale of the property, they must necessarily be judged of by the sheriff, to whom a discretion to a certain extent is thus given. The reason for adjourning the sale is within the spirit of the act, and would in general operate for the benefit of the parties. But on no principle can it annul the sale, for the sheriff is made liable to a penalty for disobeying the act; though in this instance he cannot be said to have disobeyed (18) it, for the occurrence of the election rendered it highly improper to proceed with the sale, and may, according to the act, be understood as preventing it. I approve of the ground taken by the Superior Court, and think its judgment ought to be affirmed.

HALL, J. The act of 1820, New Rev., ch. 1066, gave the sheriff the power of continuing the sale from day to day, provided the sale could not be completed on Thursday. A very good reason is given why in the present case the sale was not completed on that day. On the next day the property in question was offered for sale and purchased by the defendant, and it is objected that the sale was not good. The objection cannot be sustained. The reason for continuing the sale till Friday might be, and probably was, as good as if it had been continued over for want of time to make sale of the property on Thursday. There must be judgment for the defendant.

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*This act provides that sales shall be made at the courthouse on the last Thursday in each month; that forty days notice shall be given of sale of lands, and twenty days of sale of slaves; that the sale shall be made between the hours of 10 and 4.

HENDERSON, J., concurred.

Cited: Mordecai v. Speight, 14 N. C., 429; *Brooks v. Ratcliff,* 33 N. C., 326; *Reid v. Sargent,* 49 N. C., 454.

SCALES v. FEWELL.—From Rockingham.

A bill of sale not registered within twelve months from the time of execution, if registered afterwards by virtue of an act giving further time for registration, shall not have relation back to defeat a levy made after the execution of the bill of sale, but a period when the law giving further time had not been enacted. Such registration, however, would be good as to all future transactions.

TRESPASS for taking a quantity of tobacco. Patterson was indebted, and, to secure his creditors, on the 2 September, 1819, executed an instrument by which he conveyed to the plaintiff the property in question, in trust to sell the same, satisfy the creditors, and deliver up the sum remaining to him (Patterson). This instrument was proved and registered at November Term, 1821, of Rockingham County court. (19)

The defendant justified as a constable under two executions issuing on judgments obtained after the date of the deed of trust, and contended below that the paper, not having been registered within fifty days, under the act of 1715, ch. 38, was void as against creditors.

The jury was instructed that this instrument was not a mortgage, so as to require registration under the act of 1715.

Verdict for plaintiff; new trial refused; judgment, and appeal.

TAYLOR, C. J. The instrument under which the plaintiff claims title is a bill of sale, to the validity of which registration within twelve months is made essential by the act of 1715. The time had, therefore, expired on 2 September, 1820; but the act of 1821 allows a further time of two years, and, supposing that allowance had been availed of, the deed would have related back to its date. But in the meantime the *lien* of the executions had attached upon the property, and although the doctrine of relation as between the parties may be adopted for the advancement of justice, yet it shall not do a wrong to strangers, and cannot, in this case, overreach the *levies.* The defendant, therefore, is entitled to a new trial.

HALL, J. If the deed given by Patterson to Scales does not fall within the laws regulating the registration of mortgage deeds, it falls within the operation of another equally fatal to it. It bears date 2 September, 1819, and by the act of 1789, ch. 315, sec. 2, it ought to have been registered within twelve months after its execution; otherwise the (20) act declares it to be void and of no force whatsoever. It was not registered until November, 1821, and at that time there was no law giving further time in cases where the time had elapsed within which deeds ought to have been registered. The last law which had passed was in 1818, ch. 967. That law gave a further time of two years, but its provisions were inoperative when the deed in question was registered. The deed must, therefore, on that account give way to the executions.

It is true that an act afterwards passed, in the year 1821, chapter 10, giving a further time of two years for the registration of all grants, deeds, bills of sale, etc. It is also true, I think, that that act comprehended and validated the registration of the deed in question as to all future transactions; yet I do not think, that it divested rights under the execution which had vested before that time. I therefore think the rule for a new trial should be made absolute.

And of this opniion was Judge HENDERSON.

Cited: Jones v. Sasser, 14 N. C., 379; *Hill v. Jackson,* 31 N. C., 336; *Tooley v. Lucas,* 48 N. C., 148; *Isler v. Foy,* 66 N. C., 551; *McCall v. Wilson,* 101, 601; *Spivey v. Rose,* 120 N. C., 165; *Dew v. Pyke,* 145 N. C., 307.

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(21)

DOE ON DEMISE OF HAUGHTON & SLADE v. RASCOE & GRAY.—From Bertie.

1. Where a grant was made in 1818, and registered, but the certificate did not show at *what time* it was registered, the court will permit the grant to be read, notwithstanding a period intervened between 1818 and 1821 when no law was in force allowing further time for the registration of

grants, unless it be shown that some right vested between the time within which the grant should have been registered and the time when the act of 1821, allowing further time, went into operation.

2. A line calls for "171 *poles to Roanoke River*." The call to the river terminates when the line reaches the *margin* or *bank* of the river, without regard to distance, and the intersection of the line with the river is the point from which the next line commences.
3. Lines and courses are described, "North 12 east 530 poles, then along the thoroughfare, etc."; *Held*, that the line north 12 east shall run to the thoroughfare, without regard to course and distance.

EJECTMENT, tried before *Badger, J.* On the trial the plaintiff (21) produced a grant to his lessors, dated November, 1818. By the certificate of the register of the county in which the lands are, endorsed on the grant, it appeared that the grant had been registered, but it did not appear from the certificate at what time it was registered, nor was any proof, other than the certificate, offered as to that fact. Defendant objected to the grant as evidence, without further proof as to the time of registration, and it was received by the court subject to the exception. This grant covered the disputed premises, of which defendant had possession.

The defendant then produced a grant to Jonathan Jacocks of much older date than plaintiff's grant. This grant called (among other courses) "'*south* 14 *east* 171 *poles to Roanoke River,* then north 25 east 98 poles, then north 22 east 118 poles, then *north* 12 *east* 530 *poles,* then along the thoroughfare to the first station."

The courses on the plat annexed to this grant, and referred to (22) by it, stated the courses as in the grant, except the last course but one, which, with the last course, is stated as follows: "then north 12 east 530 poles to the thoroughfare, then along the thoroughfare to the first station."

In running the line described, "south 14 east 171 poles to Roanoke River," the river was reached at the distance of 150 poles, and defendant contended that the line should be extended into the river to the channel, so as to complete the distance.

The court held, and so instructed the jury, that the call to Roanoke River terminated when the line reached the margin or bank of the river, and that the party could not extend it beyond, but that the distance was to be disregarded and the intersection with the river was to be considered the termination of the line from which the next line was to commence; and further, that the line, "north 12 east 530 poles," should run to the thoroughfare, and that for that purpose the course and distance should be disregarded, if necessary, to reach that place.

If the lines of the grant be run according to the instructions of the court, stopping the one line at the margin of the river, and carrying the other a straight course to the thoroughfare, the land in dispute is not covered by the defendant's grant.

The jury returned a verdict for the plaintiffs. Defendants moved to set it aside and enter a nonsuit on the matter reserved as to the admissibility of plaintiffs' grant in evidence. This was refused, and a new trial was then moved for. This also being refused and judgment rendered, defendants appealed.

Gaston for defendants.
Hogg for plaintiffs.

HALL, J., delivered the opinion of the Court: I think the court was right in receiving in evidence the grant made to the lessors of the plaintiffs. It is true, the grant ought to have been registered in two years, as the law required. But by the act of 1821, ch. 10, further time of two years was given for the registration of all deeds, grants, etc., made before that time. Had any right vested between the time within which the grant ought to have been registered and the time when the (24) law of 1821 begun to operate, as in *Scales v. Fewell, ante,* 18, those rights would not have been divested by that act. But the defendants have shown no rights so circumstanced. If they had a right under the grant of Jonathan Jacocks, the plaintiff's grant, whether registered or not, would not stand in their way; but as it appears that that grant does not cover the land, and no other right is set up, the plaintiff's grant being comprehended in the act of 1821 entitles them to recover.

We see no objection to the charge of the court as to the boundaries of the land, and are of opinion that judgment should be rendered for the plaintiffs.

Cited: Moore v. Collins, 15 N. C., 402; *McCall v. Wilson,* 101 N. C., 601; *Literary Board v. Clark,* 31 N. C., 60; *Redmond v. Stepp,* 100 N. C., 219; *Bowen v. Gaylord,* 122 N. C., 820; *Whitaker v. Cover,* 140 N. C., 283.

PRACTICE—COSTS.

In equity practice a witness is paid by the party that summons him.

RYDEN AND OTHERS v. JONES.

Petition for distributive shares.

GASTON produced a notice to the petitioners from the defendant of an intended motion for a rule to show cause why there should not be a new taxation of costs in this case. It was a petition for distributive shares, filed against the defendant, as executor, in which a decree had been made for petitioners, *Ryden v. Jones,* 8 N. C., 497, and the clerk had taxed the defendant with the cost of plaintiff's witnesses. The Court granted the rule, and afterwards made it absolute, stating that cases of this kind must be governed by the rules of chancery practice, and that plaintiff might have taken the depositions of his witnesses. A new taxation of costs was ordered accordingly.

Cited: Griffith v. Byrd, 24 N. C., 72; *Newsom v. Newson,* 26 N. C., 389; *Bowers v. Bowers,* 30 N. C., 249.

PRACTICE—COSTS.

COLLINS v. JONES.

On the abatement of an action, each party pays his own costs.

IN this case the judgment below was that the suit had abated, and the administrator of the plaintiff appealed to this Court, where he came in proper person and ordered the appeal to be dismissed; and

BY THE COURT: It was adjudged that the appellant pay the costs of this Court, and that each party pay their own costs in the court below.

Cited: S. v. Wallin, 89 N. C., 580.

PIGOT v. DAVIS.—From Carteret.

1. This Court cannot, upon a record of the Circuit Court of the United States, offered in evidence, inquire into the fact whether the judgment of the Circuit Court was regularly entered up, or whether the subsequent proceedings had thereon were regular.
2. An execution when returned becomes part of the record, and a certified copy thereof is evidence.

DETINUE, for a negro. The negro belonged to George Bell, who died in 1794, after duly making his will by which he bequeathed the negro in dispute to his infant grandchildren. The executors of the will assented to the legacy, and the negro was delivered to the guardian of the infants. A judgment was obtained by the administrator of Samuel Cornell, in the Circuit Court of the United States for the District of North Carolina, against the executors of George Bell, for the sum of $2,011.60. The executors in this suit pleaded *plene administravit,* and the plea was found for them on their showing that they had paid the legacy to (26) the legatees. A *sci. fa.* issued to the guardian of the legatees to show cause why the plaintiffs should not have judgment and execution against the legatees of the assets that came to their hand. In November, 1799, there was a judgment rendered on the *sci. fa.* and at the same term the plaintiff (Cornell's administrator) sued out a writ of *fi. fa.* on the judgment, returnable to the next term of the Circuit Court, and the marshal thereupon levied on and sold the negro in dispute to the present plaintiff. The defendant derived his title from the legatees under the will of George Bell.

There was a verdict for the plaintiff, subject to the opinion of the court upon the legality of the execution, which issued before the expiration of twelve months from the time judgment was rendered in favor of Cornell's administrator. The court was of opinion that the execution was legal, and gave judgment accordingly; whereupon defendant appealed.

Before judgment was signed, the defendant moved for a new trial, because the original execution in favor of Cornell's administrator was not produced, but a copy, certified under seal of court by the clerk of the United States court. This was refused by the court.

Gaston for appellant.
(27) *Ruffin and Hawks for appellee.*

HALL, J. Whether the *scire* facias issued regularly in this case, or whether the judgment was regularly entered up upon it, this Court cannot inquire. While it continues in force it is binding upon the parties. It can only be reversed by a writ of error. It has been pronounced by a court as stable and as strongly constituted by the Constitution and laws of the country as the Court we sit in; and it is a court, too, of competent jurisdiction.

(28) As to the second objection, it may be observed that when an execution is returned it becomes part of the record of the suit,

and a copy of it, when properly authenticated, may as properly be given in evidence as a copy of any other record. I, therefore, think the rule for a new trial should be discharged.

And of this opinion was the rest of the Court.

Cited: *Snead v. Rhodes,* 19 N. C., 388; *Walters v. Moore,* 90 N. C., 46; *Brittain v. Mull,* 99 N. C., 492.

WILKES v. COFFIELD.—From Bertie.

1. A., being in want of money, applied to B., and it was agreed between them that A. should receive from B. the note of one L., which he held, and give therefor to B. a bond payable to S. the sum due on L's note, with 15 per cent. A. gave his bond accordingly to S., by whom it was indorsed to the brother of B., in whose name a suit was brought and judgment recovered, and the money was collected by an execution against A.: *Held,* that A. was guilty of usury, and that it is no defense for a lender on usury to say that he acted as another's agent, unless he disclose the agency at the time of contracting.
2. Whether, being *particeps criminis,* such disclosure at the time would avail him, *quœre.*

THIS was a *qui tam* action on the statute of usury, tried before *Badger, J.* The facts were these: Hunter swore that he applied to the defendant to borrow money; the defendant expressed a willingness to lend, but not having the money needed, it was agreed between him and Hunter that H. should take from the defendant a note on one Leary, due at that time, payable to William Coffield, executor of John Coffield, deceased, for $782.81; H. was to give for it his bond, with security, payable in six months to E. Slaughter, for a sum sufficient to include in it the amount due on Leary's note with 15 per cent thereon. H. executed the bond, with the plaintiff as his security, for $967.25, delivered it to Slaughter, and received from him Leary's note according to the agreement made with the defendant. On the trial this note appeared to be indorsed in blank by Slaughter. (29)

On 10 May, 1820 (the day when Hunter's note became due), there was due for principal and interest on Leary's note $841.50, which Hunter afterwards received or had the benefit of.

An action was afterwards brought on Hunter's note in the name of William Coffield, as assignee of Slaughter, and a judgment recovered, execution issued, and the sheriff collected the money.

The court instructed the jury that the contract stated by Hunter was a corrupt bargaining within the meaning of the statute on which the action was founded; and that if consummated by the receipt of usurious interest thereon would entitle the plaintiff to recover. And on this subject the court instructed the jury that the statute was not to be evaded by the interposition of any forms, nor were they to be blinded by any contrivances to defeat its provisions; that it was not necessary that the defendant should himself have received the money, but a receipt by an agent was sufficient; that though the action brought on the note was in the name of William Coffield, and though the money appeared to be collected for him, yet if it was really for the use or benefit of the defendant, or if the defendant otherwise received the money on the note, the plaintiff was entitled to recover. But that if they were satisfied, on examining the evidence, and the inferences they might draw from it, that although the defendant made the contract, as stated by Hunter, yet that in truth and fact he made it on account of William Coffield, had no personal interest in it; that the suit on the note was not brought for his use, nor the money received by him, nor collected for his (30) benefit, that then the plaintiff could not recover, as one necessary ingredient would be wanting to complete the usury, that is, a receipt of money on the unlawful contract.

Verdict for defendant; new trial refused; judgment, and appeal.

Hogg for appellant.
Gaston contra.

(33) TAYLOR, C. J. The question presented to the Court in this case may be decided by an application of the familiar rule that in all crimes under the degree of felony there are no accessories, but that all persons concerned therein, if guilty at all, are principals. This is not an attempt to punish the defendant for a crime committed by another, but to punish him for an offense imagined, contrived, and partly executed by himself in person, though consummated by another under his direction and appointment. The record distinctly states that the corrupt agreement was made by the defendant, and it is evident that it would have been carried through by him to its completion but for the circumstances, real or feigned, of his not having the money to lend, but only a note, then in the possession of Slaughter. If this were really the true reason why he did not lend the money, it shows that he entered fully into the scheme of committing the offense; and if it was only a pretense, it exhibits a device somewhat awkwardly contrived and easily penetrated, to evade the statute.

The specific crime then meditated was that Slaughter should receive the note from Hunter, and collect the money when due, and that he should also transfer to Hunter the note then due from Leary. And if the usurious agreement had been thus carried into execution it would have been impossible to raise a doubt as to the defendant's guilt, on Slaughter's receiving the unlawful interest. Slaughter was the defendant's agent for the very purpose of committing the crime, and though it was not completed precisely in the manner apparently contemplated, yet the authority given to Slaughter enabled him to indorse the note to William Coffield, and thereby led to the perpetration of the offense in a different shape.

These circumstances fully warrant an application of the legal (34) maxim that in investing another with a lawful authority, a man may limit it as strictly as he pleases; and if the party authorized do transgress his authority, though it be but in circumstance expressed, it shall be void in the whole act. But where a man is author and mover to another to commit an unlawful act, then he shall not excuse himself by circumstances not pursued. Thus if a man make a letter of attorney to A. to deliver livery and seizin in the capital messuage, and he doth it in another place of the land; or, between the hours of 2 and 3, and he doth it after or before; in these cases the act of attorney as to execute the estate is void.

But, on the other hand, if a man command A to rob B on Shooter's hill, and he doth it on Gadd's hill; or to rob him on such a day, and he doth it next day; or to kill B, and he doth it not himself, but procureth C to do it; or to kill him by poison, and he doth it by violence; in all these cases, notwithstanding the fact be not executed in circumstances, yet he is accessory nevertheless. *Mandata licita recipiunt strictam interpretationem, sed illicita latam et extensam.* Bacon's Maxims, Reg., 16.

A kindred principle is laid down and illustrated by the same great writer; that all crimes have their inception in a corrupt intent, and have their consummation and issuing in some particular fact, which, though it be not the fact at which the intention of the malefactor was leveled, yet the law giveth him no advantage of the error, if another particular ensue of as high a nature. Therefore, if an empoisoned apple be laid in a place to empoison J. S., and J. D. cometh by chance and eateth it, this is murder in the principal that is actor, and yet the malice *in individuo* was not against J. D.; so if a thief find a door open, and come in by night and rob a house, and be taken with the *mainour,* and break a door to escape, this is burglary, yet the breaking of the (35) door was without any felonious intent, but it is one entire act. Reg., 15.

These sound and elementary principles of criminal justice, the nonobservace of which would derange the harmony of the whole system and lead to manifold evasions, and a dangerous state of impunity, appear to me to fully justify the view I have taken of this case. They are emphatically just and important in expounding a statute, to escape from the penalties of which the cupidity of mankind is daily inventing colorable pretexts and artful expedients. Without their application the money lender might make his corrupt bargains, but, keeping his funds in another person's hands, refer the borrower to him for the sum wanted, and to secure the repayment by a note with unlawful interest, which might at once be passed into circulation for its full value. If, when the money is recovered from the borrower, the lender is deemed innocent, then so far from its being true, as the sages of the law tell us, "that where the real truth is a loan of money, the wit of man cannot find a shift to take it out of the statute," it is manifest that a very simple and obvious contrivance would render the law powerless. Like a spider in the center of its web, ensnaring its prey by distant filaments spun from its own body, the usurer might destroy his victim, and yet make no other movement than the last fatal one to devour the carcass. There ought, in my opinion, to be a new trial.

HALL, J. The case in 5 Mass., 53, goes the full length of deciding that it is no excuse for a lender on usury that he acts as agent for another, if he does not disclose at the time of lending that he acted in that capacity; and being a *particeps criminis,* it is doubtful whether such disclosure at that time could avail him.

I concur in the opinion that the rule for a new trial should be made absolute.

HENDERSON, J., concurred also.

DELOACH v. WORKE, ADMINISTRATOR OF DYSON.

1. It was the design of the act of 1807, ch. 721, to allow a plaintiff interest on the principal sum recovered from the time judgment is rendered; and the jury must distinguish between principal and interest where the whole sum is assessed in damages, but where the principal and interest are discriminated on the record, or it can be collected from an inspection of it what the principal is, interest shall be calculated on that.

2. Where, upon the plea of *nul tiel record*, it appears that no formal judgment was entered upon the record, the court must overlook the objection, as, otherwise, owing to the looseness of practice, the proceedings of courts for years back would be overturned.

SCIRE FACIAS to revive a judgment.

The defendant was sued in IREDELL County court in an action of debt founded in the obligation of his intestate for the payment of $170, made in 1812, and pleaded thereto the general issue, and retainer to the amount of $873.66½, and confessed assets in hand to the amount of $1,789.20½, and no assets beyond.

The jury found that the administrator detained from the plaintiff the sum of $190.32; that the defendant was entitled to a retainer of $876.66½, exclusive of commissions, and that there were assets beyond sufficient to pay the judgment and costs.

On the judgment a *scire facias* issued, to which the defendant pleaded *nul tiel* record, payment and set-off. It was found by a jury that "There is no payment or set off; that the judgment of $190.32, and damages by way of interest to $60.50," and the court adjudged that there was such a record. The defendant appealed to the Superior Court of the county; and a jury there found against the defendant on his pleas of payment and set-off, and the court adjudged that there was such record, and gave judgment for $190.32 principal, and for the further sum of $84.62 interest up to the present time; whereupon defendant appealed to this Court. The record did not show that any (37) formal judgment had ever been entered upon the verdict against the defendant in the first suit.

Ruffin for plaintiff.

TAYLOR, C. J. The evident design of the Act of 1807, chapter (40) 721, was to allow the plaintiff interest on the principal sum recovered in a judgment from the time of its rendition; and the direction to the jury to distinguish between the principal and interest was intended to provide for those cases in which the whole sum is assessed in damages, so as to enable the clerk or the sheriff to compute the interest on the principal sum. But where the principal and interest are discriminated on the record, or it can be collected from an inspection of it what the principal sum was, it is equally within the spirit of the act that interest should be calculated on that; and as the note is here spread on the record, and the principal of it corresponds precisely with the sum demanded in the writ, it is plain that the verdict was formed on a calculation of the principal and interest, and a deduction of the payment endorsed. There can be no difficulty in reforming the judgement of the court according to the act. The objection that no formal judgment was entered in the county court cannot prevail without reversing, perhaps, the greater part of the proceedings which have been had for years past. The judgement must be considered as entered according to the opinion which this Court has constantly entertained. *Jones v. Zollicoffer,* 4 N. C., 48.

HALL, J. It is apparent that the judgement which this *scire facias* is brought to revive was founded upon a debt due by contract, because it was obtained against an administrator, and, if so, that it bears interest from its rendition under the act of 1807, New Rev., ch. 721; but either no interest was given by the jury upon the debt due, or, if it was, it was added to the principal, and both together made the sum of $190.32. The justice of the case, therefore, is that the plaintiff should have judgement for $190.32, with interest (under the act) upon the sum of $170, part thereof which appears to be the principal of the sum originally due.

I think we must say there is such a record, for although it is (41) apparent that it is very defective for the want of entering a formal judgment upon the verdict, yet, considering the situation of many of the records of the courts of this State, were we to give a different judgment it would lead to the greatest injustice and hardship. From these considerations I think judgment should be given for the plaintiff, with interest on the sum of $170 only until paid.

HENDERSON, J., concurred.

Cited: Collins v. McLeod, 30 N. C., 223; *Harrell v. Peebles,* 79 N. C., 30; *Grantham v. Kennedy,* 91 N. C., 155; *McDowell v. McDowell,* 92 N. C., 229; *McNeill v. R. R.,* 138 N. C., 3.

MEDFORD AND WIFE *v.* HARRELL AND WIFE.—From Martin.

In a petition for partition the first judgment to be rendered is for the appointment of commissioners, and final judgment is to be rendered on their return. An appeal taken from any interlocutory judgment will be dismissed.

THIS was a petition for partition of land. At the return of the process the defendants appeared and pleaded "*Sole tenure.*" At the succeeding term the petitioners, by their counsel, moved the court for a decree of partition on the ground that defendants' plea was a nullity, they having no right to make defense, because, by the act of the Legislature giving jurisdiction in cases of petition, it was intended that the proceedings should be *ex parte.* The defendants then moved that as neither replication nor demurrer was filed to their plea, that the petition should be dismissed. The court held that the proceedings were *ex parte,* and decreed partition, and at the same time adjuged that defendants should take nothing by their motion. Whereupon defendants appealed to this Court.

PER CURIAM. This appeal is taken from an interlocutory (42) judgment, and is not sustainable under the act organizing this Court. The first judgment to be rendered by the court is the appointment of five commissioners, who are to make the partition and return their proceedings to court, upon which the final judgment is to be given.

The appeal must be dismissed.

THE GOVERNOR v. WITHERSPOON AND OTHERS.—From Wilkes.

1. Where suit was brought on a bond given by a sheriff, but not drawn conformably to the directions of the act of Assembly, the suit was sustained; the bond being held good as a voluntary bond.
2. In such a suit a suggestion of damages should be made under the *Stat. of Will.* III., but if not made, it is no good ground of objection after verdict,

THIS was an action of debt brought against the defendant Witherspoon, former sheriff of Wilkes, and his securities on a bond executed by them, which was in the following words:

"We and each of us oblige ourselves, our heirs, etc., to pay to the Governor of the State of North Carolina, and his successors in office, the full sum of $4,000; void on condition that Thomas Witherspoon, Esquire, high sheriff of the county of Wilkes for the year 1820, shall well and truly do his duty in office as sheriff for said year, in every respect according to law. Witness our hands and seals this 2 May, 1820.

Witherspoon in 1820, as sheriff, received a sum of money on an execution at the instance of Chambers, and failing to pay it over, this suit was brought and a verdict rendered for plaintiff. Defendants moved for a new trial on the ground that the bond was insufficient and not drawn pursuant to the act of Assembly. *Paxton, J.,* who presided, refused a new trial and rendered judgment, from which (43) defendamts appealed.

HALL, J. If a recovery cannot be had in the present case, it cannot be because the contract of the parties will not warrant it. The contract of the parties fully sustains the verdict and judgment of the court.

But it is said, and truly, that the bond has not been taken conformably to the directions of the act of Assembly; so it was objected in *Bank v. Twitty,* 9 N. C., 5, but it was decided in that case, and the Court is now of opinion, that the bond was good as a voluntary bond.

The magistrates of the county were empowered by the Legislature to take from the defendant a bond, and the form of that bond is prescribed. The bond was not taken for the benefit of the justices, but for the benefit of the suitors, whose money might come into the hands of the defendant as sheriff and be by him improperly detained, as seems to have been done in the present case. The present plaintiff had no agency in taking the bond, and if the bond, although bad in form, is in its terms sufficient to warrant the present action, it would be the height of injustice to declare it invalid on account of form. It is not like the case of a bond taken by a sheriff contrary to the provisions of the act of Assembly. All such bonds are declared to be void.

But an objection has been here made to the form of the proceedings in this case. It has been said that under the Stat. of Will. III. a suggestion of damages ought to have been placed upon the record. It is true that ought to have been done, but there is no doubt but that a suggestion of the sort was made, and proof made accordingly; for the jury, by their verdict, have found damages in consequence of such proof, and the court has given judgment thereon and the omission to suggest damages on the record ought *now, after verdict,* either to be
(44) overlooked or leave should be given to enter it *nunc pro tunc.* 2 Saund., 187, n.

Cited: Governor v. McAffee, 13 N. C., 17; *Branch v. Elliott,* 14 N. C., 89; *Williams v. Ehringhaus, Ib.,* 298.

DOE ON DEMISE OF WILSON v. ALLEN TWITTY, WILLIAM TWITTY, AND DAVID TWITTY.—From Lincoln.

1. There are no particular rules of conduct prescribed by positive enactment to sheriffs in the sale of lands; but it is their duty to sell in that way by which most money will probably be raised; a sale *en masse* of several tracts of land, held under distinct titles, and not lying contiguous, was supported. However, where it did not appear that either the sheriff or purchaser knew the situation of the land.

2. Where a sheriff levied on land and negroes, and left the negroes in defendant's possession, taking a bond for their production on the day of sale, it was Held, that the negroes not being forthcoming, the sheriff might lawfully sell the land.

EJECTMENT, in which plaintiff's lessor claimed under a sheriff's deed for the disputed premises.

A judgment having been obtained in RUTHERFORD at the instance of Ann Waters against the defendant Allen Twitty, execution was sued out thereon, and by the present plaintiff was placed in the hands of the sheriff, who made thereon a return that he had "Levied on 1,050 acres of land on Green River, and on both sides of Walnut Creek, including the plantation on which Allen Twitty and William Twitty live, including the whole of their improvements and mills; and on 7 June levied on sixteen negroes, the property of Allen Twitty, and on this day, 28 June, the above land was exposed to sale, when Joseph Wilson, Esquire, became the last and highest bidder for the sum of $800." The return went on to state that the sale of the negroes was postponed, and afterwards a part of them (seven) sold for $1,301. (45)

Allen Twitty and the other defendants, his sons, were in possession of the lands at the time of the sale and the bringing of the action; and Allen Twitty had been in possession nearly thirty years, claiming as his all the lands which were levied on and sold. The present plaintiff, who was interested in the judgment under which the lands were sold when he delivered the execution to the sheriff, directed him to levy it on Allen Twitty's land and negroes, and when the sheriff went to make the levy he asked Twitty how much land he had there, and was answered 1,050 acres, and the sheriff levied accordingly. The sheriff did not know, nor was it made known at the time of the sale, that the land was held under different and distinct deeds; but he did know at the time of the levy that William Twitty and Allen Twitty lived on different parts of the land, at the distance of a mile from each other. Allen Twitty did not inform the sheriff at the time of the levy on the negroes that they belonged to William; the sheriff left the negroes with Allen Twitty, taking from him a bond to produce them on the day before the day of sale, but they were not produced on that or the following day. William Twitty at the sale attended and claimed the property as his, forbidding a sale.

The tracts of land were meadow or cleared lands, some lying on the river and some back, and not all contiguous, and in 1814 and 1815 Allen Twitty gave in the lands to the assessor, describing them as distinct tracts and belonging to him.

Three objections were taken below to plaintiff's recovery: first, that the mode in which the sheriff sold the lands (in one lot) was illegal; secondly, that the plaintiff's lessor having been beneficially interested in the judgment under which the land was sold, was bound by an (46) illegality or irregularity in the sheriff at the sale; thirdly, that the land was sold before the negroes.

The defendant produced several deeds under which the land was held to show them to be distinct tracts, and also proved that if all the negroes levied on had been sold they would have paid the debt, supposing them to sell as well as those which were sold.

Nash, J., who presided, charged the jury that in an action of ejectment, brought by a purchaser at sheriff's sale, against the defendant in the execution, it was not necessary for the plaintiff to show that the defendant had any title, nor was the defendant at liberty to show title out of himself; but that the plaintiff had made out his case when he showed a judgment, execution, sale, and sheriff's deed to himself, and possession in the defendant at the time the action was brought. Upon the first objection made the jury was instructed that where a sheriff levied on lands consisting of different tracts it was his duty to levy on them as such, and also sell them separately, but that where land was levied on by an officer, under a description given of it by the owner, a sale of it by the officer under that description, so far as the owner, the defendant in the execution, was concerned, was illegal, but lawful; the officer not being apprised before the sale of the fact of there being different tracts, nor requested to sell them separately.

As to the second objection, the judge charged that the plaintiff, having been substantially interested in the execution under which the land was sold, was affected by any irregularity or illegality in conducting the sale; and further, that any combination between a purchaser and an officer so to conduct a sale as to occasion any injury to the owner of the property rendered the sale void; and whether there was any such combination in this case was left to the jury as matter of fact.

As to the third point raised, the jury was told that when, to (47) satisfy an execution, an officer levies upon real and personal property, the law requires him to sell the latter first; but where under the provisions of the act of Assembly the sheriff leaves negroes in the possession of the debtor, taking bond and security for their forthcoming on the day of sale, and at that time they are not produced, he was not only at liberty to sell the lands, but might be punished if he did not.

Verdict for the plaintiff's lessor; judgment and appeal on the refusal of the court below to grant a new trial.

Gaston for appellants.
Ruffin for appellees. (48)

HALL, J. It is much to be regretted that a more particular rule of conduct has not, by the law, been prescribed to sheriffs in sales of landed property under execution. A difficulty exists in this country (which the law has not provided for) from the circumstance (49) that most of the lands are uncultivated and covered with wood, and on that account their boundaries are more difficult to be ascertained; and it has not been made the duty of sheriffs to set forth their boundaries in their advertisements, or to make them known, particularly on the day of sale. They have not been required to ascertain and set them forth in any better way than they are enabled to do from common report, and from the common channels of information through which people generally acquire a knowledge of them.

The practice has been to put up the land for sale by a general description of it, as the land on which the defendant lives, or his lands lying on such a water-course, or as known by such a name. It has not been made the sheriff's duty to ascertain and make known the title, whether it be held under one or more grants or deeds, or from whom the defendant purchased it.

I believe it is not usual to sell at once two unadjoining tracts, nor do I know that it is forbidden in express terms. It is surely the sheriff's duty to sell in that way that will likely be most beneficial to both parties. I mean in that way that will produce the most money.

In the present case the lands were adjacent to each other, but were held under different titles, and did not lie adjoining to each other, but their boundaries were not far apart. It did not appear that this fact was known either to the sheriff or to the purchaser. It was woodland that separated them. Twitty, with the exception of his son's possession, was possessed of and claimed title to all the lands, and told the sheriff that he had 1,050 acres in that part of the county.

It seems that all the lands when sold, did not produce as much money as the execution called for; and if the lands had been sold in separate lots, one probably would not have sold for more than both together brought when sold together. (50)

The question of fraud had been fairly left to the jury; they have been directed to find for the defendant, if there was fraud practiced either by the sheriff or purchaser. Of course, no inquiry is to be made of that at this time.

Another circumstance may be here noticed, and that is, Why did not the defendant object to the sale, at the return of the execution? There would have been less difficulty then in setting aside the sale if it had been made with loss to the defendant, on account of any misunderstanding either of title or location. But the purchase money was suffered to be paid, and there has been an acquiescence under the sale until the bringing of this action. The sheriff was not to blame for not selling the personal property first. The negroes were kept back by the defendant himself. He, therefore, ought not to complain on that account.

Without, therefore, adopting rules for the government of sheriffs, which have not been prescribed and enforced heretofore, and from a view of the whole case, and circumstances attending it, I am of opinion that the rule for a new trial should be discharged.

The rest of the Court concurred.

Cited: Thompson v. Hodges, post, 55; *Huggins v. Ketchum,* 20 N. C., 557; *Jones v. Lewis,* 30 N. C., 73; *Pemberton v. McRae,* 75 N. C., 499; *McCanless v. Flinchum,* 98 N. C., 365; *Williams v. Dunn,* 163 N. C., 217.

(51)

DOE ON DEMISE OF THOMPSON v. HODGES.—From Cumberland.

A sale by a sheriff, *en masse*, of tracts of land adjoining each other will be supported.

EJECTMENT, tried in CUMBERLAND, before *Norwood, J.*

The facts as they appeared below were the following: The lessor of the plaintiff purchased the lands in dispute of James Atkins and John Thames, and made title as follows: "In December, 1809, a judgment was obtained by Dew and Barnes against Philemon Hodges for £829 3 9, and an execution issued thereon, on which a return was made by the sheriff that he had levied on several tracts of land, and among others "the land where P. Hodges lives, with about 2,000 acres of land." A *venditioni exponas* issued, commanding a sale of the land levied on, and the sheriff returned thereon a sale of the several tracts; and as to the disputed premises the return was in these words: "1,920 acres of the land belonging to the home plantation, bid off by James Atkins at £650 10; 80 acres remainder of said lands, bid off by James Atkins at £2 10." The sheriff on 30 April, 1812, executed a deed to Thames and Atkins for land, reciting the execution and stating that he had levied "on sundry tracts or parcels of land situate, lying, and being in the county of Cumberland, on the lower Little River, including the houses, lands and improvements, whereon said Hodges then lived and now lives, it being the whole of the lands said Hodges owned in that body in Cumberland

County, and all the different tracts joining each other, containing by estimation 2,200 acres, more or less." The consideration money of the deed was $1,301, equal to £650 10, and the sale took place in 1810. Thames and Atkins conveyed to the lessor of the plaintiff. (52)

The 1,920 acres were set up for sale by the sheriff, *en masse,* and included sundry tracts adjoining each other. The house in which the defendant resided at the time of the sale was 2 miles distant from that in which he lived at the time the deed was executed, and they were on different tracts of the 1,920 acres. Various objections were made below to plaintiff's title, among others, the two following: That the sheriff had levied on and sold to Thames and Atkins 2,000 acres, more or less, and had conveyed 2,200 acres, more or less, and that the sale of the 1,920 acres, *en masse,* was, in law, a fraud and vitiated the whole sale. On the last mentioned point the court instructed the jury that a sheriff is bound to use such means in the sale of property under execution as any ordinary and prudent man would do in the sale of his own property, in order to make it bring the best possible price; and it was for the jury to say, as on this case, whether under the circumstances of it it was apparent that the sheriff had sold the land improperly in making the sale *en masse,* and thereby sacrificed the property; if so, no title in the property passed to the plaintiff; if otherwise, the sale was valid; and that their finding upon this part of the case should be regulated accordingly. A verdict was returned for the lessor of the plaintiff; and the case stood before this Court on a rule to show cause wherefore a new trial should not be granted.

Gaston in support of the rule.
Ruffin contra.

PER CURIAM. This case is much stronger for the purchaser (55) than the case of *Wilson v. Twitty, ante,* 44, decided at this term, and to which we refer for the principles governing the case. The rule for a new trial must be discharged.

Cited: Huggins v. Ketchum, 20 N. C., 557; *Jones v. Lewis,* 30 N. C., 73; *McCanless v. Flinchum,* 98 N. C., 365; *Williams v. Dunn,* 163 N. C., 217.

TATE AND OTHERS v. BRITTAIN.—From Burke.

A mortgage deed not registered in time, when registered has no relation back to its date, but operates only from the time of registration: It shall not, therefore, avail anything against an execution levied after its date and before its registration.

TRESPASS for taking a negro boy out of the possession of the plaintiffs.

The plaintiffs on the trial below produced a mortgage deed for this negro and other property, executed by John McGuire on 2 May, 1820, certified to be proved at July session of Burke County court (the first court after its execution) and registered 29 July, 1820; they then proved that they were the securities of McGuire to a large amount, and took the mortgage to secure themselves; when the deed was executed but one of the plaintiffs was present, to whom it was delivered. On the succeeding day McGuire delivered all the property to one of the plaintiffs, who left it in McGuire's possession. About two weeks after, one of the plaintiffs took the negro boy into his possession, and while thus situated defendant took him and sold him.

The defendant, who was sheriff of the county, produced a (56) judgment granted by a justice of the peace in favor of one Caldwell, on the 2 June, 1820, against John McGuire, execution thereon issuing on the same day, which defendant levied on, 4 June, 1820, upon the negro boy, and on the 28th sold him. Defendant had notice of the mortgage before and at the time of sale.

The jury was instructed that a delivery of the mortgage deed to one of the plaintiffs was a delivery to all; but as it was not registered within the time limited by law, viz., fifty days from its date, it must yield to liens created after its date and up to its registration; that the plaintiff's mortgage, not having been registered in time, could have no relation back, but acquired its efficacy from the date of its registration, so far, at any rate, as the liens created by the execution under which the defendant acted was concerned, and must give way to it.

Verdict for the defendant and judgment accordingly, and the cause was heard in this Court on a rule to show cause why a new trial should not be granted.

HALL, J. I think this case falls within *Davidson v. Beard,* 9 N. C., 520, and to that case I refer. Let the rule for a new trial be discharged.

In this judgment the CHIEF JUSTICE and Judge HENDERSON concurred.

NESBITT v. BALLEW.—From Burke.

1. **A defendant brought in as bail on *sci. fa.*, pleaded in the county court certain pleas, and a judgment was rendered against him. On appeal to the Superior Court it did not appear how the pleas in the county court had been disposed of, and therefore it was held by this Court that the judgment of the Superior Court against the defendant was improperly rendered.**
2. **By the act of 1803 all executions issued by a justice of the peace must be made returnable within three months, and an officer is not at liberty to return them unexecuted in a shorter time.**

THE plaintiff by warrant obtained a judgment on 23 October, 1819, against one Brack for $35.18¾ debt and 50 cents costs, and the defendant became *bail* to the officer for Brack's appearance. On 29 October, 1819, a *ca sa.* issued against Brack, and on 1 December, 1819, the plaintiff sued out before a magistrate a notice in the nature of a *scire facias* against defendant, setting forth therein the recovery of the judgment aforesaid against Brack; that execution thereof remained to be had; that the defendant, on 21 October, 1819, became *special bail* for Brack, by a bond for that purpose duly executed by David Biddle, constable, upon the execution of the warrant; that the said Brack had not paid the said judgment nor rendered himself to prison; nor had the defendant surrendered him in discharge of himself, and requiring the defendant to appear before a magistrate and show cause why the plaintiff should not have *execution* against him for the debt and costs aforesaid. This notice was returned before a magistrate, "executed 26 January, 1820, when it was dismissed at the plaintiff's costs; from this judgment the plaintiff appealed to the county court, where the defendant appeared and pleaded." *No capias issued against principal; principal surrendered; payment; set-off; stat. lim.;* and a judgment was in the county court rendered in favor of plaintiff, when the defendant appealed to (58) the Superior Court. At September Term, 1823, the cause came on and was argued, when the judge took time to consider; carried the papers with him on his circuit, and after the adjournment of the court returned them to the clerk indorsed, "My opinion is that the judgment ought to be entered for the plaintiff." Upon this execution issued against defendant, and at the next court he, by his attorney, moved to set aside the execution, which was done. The plaintiff, by his counsel, then moved that upon the indorsement of the judge who presided at the last term a judgment be entered up against defendant, which was done; and from this judgment he appealed to this Court.

HALL, J. It appears that the defendant pleaded certain pleas in the county court in discharge of himself as bail, but how those pleas have been disposed of does not appear. I think that should have appeared before judgment was given against the defendant in the Superior Court.

Another objection presents itself in this case. A *ca. sa.* issued against the body of the debtor 29 October, 1819, and the *sci. fa.* issued against the bail on the 1 December of the same year. By the act of 1803, ch. 627, sec. 6, all executions issued by a justice of the peace shall be made returnable in three months from the date of said execution. The officer might execute it as soon as he could; but the Legislature prescribed that time with which it was his duty to endeavor to execute it, and he was not at liberty to return it unexecuted in a shorter time. This has been done in the present case; and if an officer is at liberty to return it in one month, he may return it in one week or in one day.

The object of the Legislature was to make the burden of the (59) debt fall upon the debtor, if he could be reached in this way, and only to have recourse against the bail in case that mode of proceeding against the principal proved unsuccessful. For these reasons I think the judgment given in the Superior Court should be reversed.

And of this opinion was the rest of the Court.

PER CURIAM. Reversed.

Cited: Tyson v. Short, 50 N. C., 281.

AYRES v. PARKS, ADMINISTRATOR OF HUMPHRIES.—From Iredell.

Where words importing a warranty of soundness are inserted in a conveyance of slaves, the court will not consider them as a bare *affirmation*, which does not amount to a warranty, unless it appears in evidence to have been so intended, but will deem them *part of the contract*, as otherwise they would not have been inserted. These words, viz., "all the above named negroes are sound, healthy, and clear of disease, and slaves for life, and warranted and defended from all manner of claims whatever," contain a warranty of title and a warranty of soundness sufficient to support an action.

COVENANT upon a warranty in a bill of sale of negroes, brought to recover the value of one of the negroes, Peggy. The bill of sale was as follows:

"Received of David B. Ayres $1,750 in full satisfaction for three negro girls, Sukey, Peggy, and Jane. All the above named negroes are sound, healthy, and clear of disease, and slaves for life, and warranted and defended from all manner of claims whatsoever. Given under my hand and seal this 16 November, 1818."

Two grounds of defense were taken below: first, that the bill of sale contained no warranty of soundness; and, secondly, that if the covenant did amount to a warranty, it was obtained by fraud. The unsoundness of Peggy was an extraordinary bleeding at the nose, to which she had long been subject, and of which she died within a year (60) after plaintiff bought her. It was in evidence that the bill of sale was written by the plaintiff, and when presented to the defendant's intestate she refused to sign it unless the bleeding was excepted; the plaintiff refused to receive a conveyance at all, or to purchase the negroes, unless defendant's intestate would sign that deed, at the same time observing that he was buying to sell again, and such an exception in his title would injure the sale; that he intended to carry the slave to the south, and that she would never be called on on account of Peggy's defect. Defendant's intestate thereupon signed the bill of sale, and afterwards assigned as a reason for so doing that the price was a very large one, greater than she could get again, and she did not expect from the distance to which the negroes were to be carried that she would ever be called on to answer for Peggy's unsoundness.

The court instructed the jury that the bill of sale did contain a warranty of soundness, which, if untrue when given, entitled the plaintiff to his action if it were not obtained by fraud.

Verdict for plaintiff, new trial refused, judgment, and appeal.

Gaston for appellant.
Wilson contra.

HALL, J. An affirmation at the time of sale is a warranty, provided it appears in evidence to have been so intended. 3 Term, 57. (61) Whether it was so intended is a matter of fact to be left to the jury. In the present case, whether there is a warranty contained in the deed on which this action is brought is a question of law, and, of course, must be decided by the court.

I admit that a bare affirmation is only an inducement to make the contract, but ought not to be considered as part of the contract, and that there is no remedy upon it unless you bring home a *scienter* to the party making it.

In the case before us, if the words of the deed on which this suit is brought had been regarded in the light of an affirmation, and not as a part of the contract, it is to be presumed that they would not have been inserted in the deed; but as the parties thought proper to insert them in the deed it is a strong circumstance to show that they were so inserted as a part of the contract.

If they are considered a part of the contract their meaning is obvious: there can be no doubt about the justice of the verdict. It is stipulated that the slaves are sound, healthy, free from disease, and slaves (62) for life, and warranted and defended from all manner of claims whatsoever.

There is no doubt but what an action would lie upon the latter part of the clause where the titles of the slaves are warranted against all claims whatsoever, and I think there is no doubt but an action would lie upon that part of the clause which asserts that they are slaves for life, because that is a warranty relative to the title. It would seem strange, then, that the same words, when applied to the quality of the property sold, would not, also, amount to a warranty of that.

With respect to the fraud complained of by the defendant, that was laid before the jury; it was their province to consider of it, and not the province of this Court. They have done so, and their verdict, as far as it is founded upon fact, is not under the control of this Court.

Let the *quo animo* with which the contract was executed, as evidenced by the deed, be what it might, it is immaterial; it is our duty only to say what the contract was, and in doing that I must say that the contract was such as will sustain this action, and that the rule for a new trial must be discharged.

TAYLOR, C. J., and HENDERSON, J., concurred.

Cited: *Baum v. Stevens,* 24 N. C., 412; *Toggart v. Blackweller,* 26 N. C., 240; *Horton v. Green,* 66 N. C., 600; *Hodges v. Smith,* 158 N. C., 260.

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(63)

KINCADE v. BRADSHAW.—From Rowan.

In an action for slander, in charging a plaintiff with perjury, defendant is not bound in support of the plea of justification to produce such evidence as would convict the plaintiff if he were on trial for the offense.

CASE FOR SLANDER. The words spoken charged the plaintiff with the crime of perjury. Pleas, the general issue, justification, and the statute of limitations. The only point presented was whether, to support the plea of justification, it was necessary to do more than to produce such evidence as would raise a probable presumption of the plaintiff's guilt, or should it be such as would be requisite to convict the plaintiff of perjury on an indictment. The court below held that it should be such as would convict if the plaintiff were on trial for the offense. Under the charge of the court a verdict was found for plaintiff, and the question was here argued on a rule to show cause why a new trial should not be granted.

Ruffin for appellee.

TAYLOR, C. J. This case comes up upon an exception to (64) the judge's charge, which it is therefore, necessary to examine. It contains two positions. The first is that the defendant could only entitle himself to a verdict upon his plea of justification by giving such evidence as would be sufficient to convict the plaintiff if he were on trial for the offense. The second is that if the slanderous words had been spoken by the defendant, and the evidence did not satisfy the jury of their truth, the plaintiff was entitled to some damages.

This last position, as stating the true ground upon which that part of the case ought to have been left to the jury, is entirely unexceptionable, and could not furnish a reason for a new trial if it could be disconnected from the first one. But it plainly imports that the jury must be satisfied of the truth of the words spoken, not by such evidence as is sufficient to create conviction in ordinary cases of civil controversy, but by such evidence as will be sufficient to convict the plaintiff of perjury if he was on trial. We are, therefore, called upon to examine the correctness of this position. It may be laid down as a general rule that the doctrine of evidence in criminal prosecutions is the same as that in civil actions, the object of both being to arrive at truth. (65) But several exceptions have been introduced by statute; some by the necessity of the case, where the party injured is admitted to give testimony against an offender from whose conviction he is to derive some advantage to himself; and one founded upon the constitution of human nature, that in proportion to the magnitude of the offense juries are more or less disposed to be governed by evidence that is doubtful.

Hence, where life is in question, or where the party has much at stake, evidence is more cautiously received than in contests about property, and juries are instructed not to weigh the evidence, but, in cases of doubt, to acquit the prisoner. Sir Ed. Coke exhorts juries not to give their verdict against a prisoner without plain, direct, and manifest proof of his guilt, which implies that where there is doubt the consequence shall be the acquital of the party upon his trial. In civil cases, on the contrary, juries weigh the evidence and decide accordingly as either scale preponderates.

It cannot, therefore, be a correct rule that a jury should require the same strength of evidence to find a fact controverted in a civil case which they would require to find a man guilty of a crime. But the crime of perjury stands upon peculiar grounds, and requires more evidence to produce a conviction than crimes in general. One witness is not sufficient, because then there would only be one oath against another. A man knowing another to have commited perjury may forbear to prosecute him for the very reason that there is but one witness by whom the crime can be proved. Shall he, therefore, be deprived of his justification if sued in an action of slander, although he might be furnished with convincing evidence of the truth of the words? Both reason and authority answer in the negative.

In the *Queen v. Murat,* 10 Mod., 195, the principles I have (66) stated are perspicuously enforced by the Chief Justice in his charge to the jury. His words are: "There is this difference between a prosecution for perjury and a bare contest about property, that in the latter case the matter stands indifferent, and, therefore, a credible and probable evidence shall turn the scale in favor of either party; but in the former presumption is ever to be made in favor of innocence, and the oath of the party will have a regard paid to it until disproved. But it must be a clear and strong evidence, and more numerous than the evidence given for the defendant, else there is only oath against oath." In this opinion is contained the very principle upon which the case before us depends, and it shows, beyond doubt, that there ought to be a new trial.

Judges HALL and HENDERSON concurred.

PER CURIAM. New trial.

Cited: Barfield v. Britt, 47 N. C., 44; *Burton v. March,* 51 N. C., 413; *Blackburn v. Ins. Co.,* 116 N. C., 825; *Chaffin v. Mfg. Co.,* 135 N. C., 100.

PLUMMER v. GHEEN.

1. If a man prosecute another from real guilt, however malicious his motives may be, he is not liable in an action for malicious prosecution; nor is he liable if he prosecute him from apparent guilt arising from circumstances which he honestly believes.
2. The question of probable cause is compounded of law and of fact: Whether certain circumstances are true is a question for the jury; whether, being true, they amount to probable cause, is a question of law.
3. A party has a right to the opinion of the court distinctly on the law, on the supposition that he has established, to the satisfaction of the jury, certain facts.

APPEAL from *Donnell, J.,* at ROWAN.

Case. The declaration contained two counts, the first for slanderous words spoken, in charging the plaintiff with having committed a perjury; the second count was for a malicious prosecution.

The words were proved to have been spoken; and in support (67) of the second count the plaintiff gave in evidence a State's warrant which had been issued against him for perjury, upon the oath of the defendant and the record, showing that a bill of indictment for perjury had been preferred against the plaintiff in Rowan Superior Court, on which the defendant was marked as prosecutor and the return of the grand jury thereto, "Not a true bill," and that the plaintiff had thereupon been discharged

The defendant relied upon the plea of justification, and there was much conflicting testimony, which (as far as is necessary) is brought into view in the opinion of the Chief Justice. The defendant prayed the court to instruct the jury that if the witnesses were to be believed probable cause was made out. On this part of the case the court (*Donnell, J.,*) explained to the jury its view of the meaning of probable cause; that it was by no means necessary that it should be a good cause; that if the plaintiff had taken the oath, in which the perjury was charged, in such a manner and under such circumstances as to warrant a reasonable suspicion in the mind of the defendant that he had perjured himself, it was sufficient; that although probable cause was partly a question of law, yet it was so dependent on facts and circumstances of which the jury were the only judges, on the various circumstances attending the transaction, and the knowledge the prosecutor had of those circumstances, on the conduct of witnesses and the inferences that might be drawn from their testimony, that in a case like this, in which the parties had gone into evidence of the whole transaction, and in which there was such contradiction in the testimony of many of the witnesses, the court deemed it most proper to leave to the jury on this count in the declaration to say whether the defendant had not this probable ground for suspicion amounting to probable cause; and that if they should think so, they must find for him on this count. That if they found for plaintiff the verdict might be general on both counts, or it might be on one only. (68)

The verdict was general for the plaintiff. An unsuccessful application for a new trial was made by defendant, and from the judgment rendered he appealed.

Ruffin for defendant.

TAYLOR, C. J. The most material ground of this action is that a legal prosecution was carried on against the plaintiff without probable cause, and this it was incumbent on him to prove expressly, for it cannot be implied. Where probable cause is absent, it is usual to imply malice as well as the knowledge of the defendant; but the want of probable cause cannot be implied from the most express malice. If a man prosecute another from real guilt, however malicious his motives may be, he is not liable in this action, nor is he liable if he prosecute him (69) from apparent guilt, arising from circumstances which he honestly believes. These principles have been repeatedly laid down and sanctioned, and are necessary to be kept in view in considering the nature of the action. 1 Term, 544.

In order to repel the *prima facie* evidence of the want of probable cause arising from the indictment not being found a true bill, the defendant introduced several witnesses for the purpose of showing that the plaintiff swore falsely in two particulars upon the trial of the warrants before the magistrates. These were, first, as to the nature of the contract between Mr. Winders and Robinson, whether the rent was payable in *money* or *corn,* at the option of the former; secondly, whether the money was due presently or payable in two months. Much evidence on the first point was adduced on both sides, to the end of showing, on the part of the plaintiff, that the contract was absolute for the payment of money, as he had sworn it to be; and, on the part of the defendant, that there was an option in the tenant to pay money or corn, and that consequently the plaintiff had perjured himself. Whether he did or not depended on the weight and credibility of much conflicting evidence. But if the jury believed that adduced by the defendant, it is incontrovertible that there was probable cause for the prosecution. If, on the other hand, they believed that introduced by the plaintiff, there was not on this part of the case any probable cause, and malice was to be inferred; and this, I apprehend, is the instruction that ought to have been given by the judge. On the second point the plaintiff swore at the first trial that he did not remember when the money was to be paid, whether in two, three, or six months, or ever. On the second trial, which was shortly afterwards, he swore that the money was to be paid within two months; and it was on this occasion, when Mr. Winders called to the plaintiff's recollection what (70) his testimony had been on the first trial, that the defendant demanded a warrant against him. On this part of the case it should have been submitted to the jury to inquire whether the plaintiff's two oaths were in conflict with each other; and, even if they were not, whether the circumstances were such as to produce apparent guilt, and raise a belief in the defendant that the plaintiff had perjured himself; and that in either of these two cases the defendant should be acquitted on this part of the case.

As the question of probable cause is compounded of law and fact, the defendant had a right to the opinion of the court distinctly on the law, on the supposition that he had established to the satisfaction of the jury certain facts. Whether the circumstances were true was a question for the jury; whether, being true, they amounted to probable cause, is a question of law.

It is true that the court explained to the jury what probable cause was, and explained it correctly; but then, in the subsequent part of the charge, it is left at large for the jury to say whether the defendant had not this probable ground for suspicion amounting to probable cause; whereas the right instruction was that if the defendant had, in their opinion, this probable ground of suspicion, *it amounted in point of law* to *probable cause.* I am of opinion, therefore, that there ought to be a new trial.

HALL and HENDERSON, JJ., concurred.

PER CURIAM. New trial.

Cited: Beale v. Roberson, 29 N. C., 283, 284; *Woodard v. Hancock,* 52 N. C., 386; *Jones v. R. R.,* 125 N. C., 229; *Stanford v. Grocery Co.,* 143 N. C., 424; *Wilkinson v. Wilkinson,* 159 N. C., 268, 269; *Wright v Harris,* 160 N. C., 551.

(71)

ARRINGTON v. SHORT.—From Nash.

An inquisition of lunacy, which appeared to have been taken by the coroner and twelve freeholders, and returned to the county court, and by it confirmed, and from which it did not appear that the lunatic was present, was offered in evidence to support the plea of *non compos mentis. Held,* that, having been received by the county court as an inquest, and a guardian having been appointed under it, it was too late to question it as an inquest.

DEBT, on defendant's bond. Defendant appeared by his guardian and pleaded the general issue, payment, set-off; that defendant was an idiot and *non compos mentis* at the time of executing the bond, and so found by the inquest of a jury; that the bond was obtained by fraud, and the consideration thereof fraudulent; to which pleas there was a replication and issue.

The signing of the bond was proved, and the sole question was as to defendant's capacity to contract; on which point much contradictory evidence was offered. The inquisition of lunacy, which appeared to have been taken by the coroner and twelve freeholders and returned to the county court, and by it confirmed, was prior in point of time to the execution of the bond, and was offered in evidence. It was objected to for two reasons: First, it did not appear to have been taken by proper authority; and, second, it did not appear that the pretended lunatic was not present before the jury.

The proceedings on the inquiry as to defendant's sanity appeared to have been commenced by an order of Nash County court directing the coroner to summon a jury to inquire. The court permitted the proceedings to be read, subject to such remarks as it might make thereon in instructing the jury, and after explaining in his charge what the law intended by the reason and understanding sufficient to contract,
(72) the presiding judge remarked on the proceedings that if regular they would be but *prima facie* evidence of defendant's incapacity, but that here they were irregularly taken and void as an inquisition, though the jury might give to them the same weight which they would to the opinions of any twelve respectable men. Verdict for the plaintiff; new trial refused; judgment, and appeal.

Mordecai for appellant.
Hillman contra.

(73) HALL, J. It seems to me that the court erred in stating to the jury the paper-writing purporting to be an inquest of lunacy was not, and ought not to be considered in the light of an inquest. I think it was too late to question it. It had been received by the county court as such; they had proceeded to appoint a guardian in consequence of it, and the proceedings show that that guardian had been, by the plaintiff himself, made a party to this suit. It is true, the writing or inquest was read to the jury; but its effect might have been weakened by
(74) stating to them that it was only the opinion of twelve honest men, but not such evidence as a lawful inquest would be. Although received as an inquest, it would not be conclusive evidence; yet it ought to have been given to them in that character. We, therefore, think a new trial ought to be granted.

PER CURIAM. New trial.

Cited: *Parker v. Davis*, 53 N. C., 462; *Sprinkle v. Wellborn*, 140 N. C., 180; *In re Propst*, 144 N. C., 566.

NATHANIEL AND SALLY TOLAR v. MARIA AND HARRIET TOLAR.

"I give and bequeath all that I possess, indoors and outdoors": ***Held,*** **that these words in a will are sufficient to pass real estate.**

PETITION for partition of lands described in the petition, of which Matthias Tolar died seized, and which the petitioners alleged descended upon them and the defendants, as tenants in common, as the heirs at law of Matthias Tolar. The cause came on to be heard at Spring Term, 1824, of CURRITUCK, before *Badger, J.,* when the following appeared to be the facts:

Matthias Tolar was seized in his lifetime in fee simple of the lands mentioned in the petition, then of the value of $2,000, and was possessed of a small personal estate, and being so seized and possessed, on 13 April, 1812, duly made and published his last will and testament, executed so as to pass real estate, in the following words:

"This may certify that I, Matthias Tolar, do give and bequeath unto my wife, Sally Tolar, all that I possess, indoors and outdoors, except she should get married; and if she does, then to my two daughters, Maria and Harriet Tolar; one shilling to Nathaniel Tolar, and one shilling to Sally Tolar, junior. This is my will and wish, after my debts are paid." (75)

Matthias Tolar died without having revoked or altered his will; which, after his death, was duly proved in Currituck County court. The petitioners are the children of Matthias Tolar by a former wife, and the defendants were the children testator had by the wife named in his will, and these four are his only heirs at law. The last wife survived her husband, and was married again before this petition was filed. Testator's personal estate was exhausted in the payment of his debts.

The petitioners contended that the lands did not pass under the will, but descended to them and the defendants, and prayed for a writ of partition. The defendants claimed the lands under the will as devised to them, and moved to dismiss the petition.

The presiding judge being of opinion that the lands did pass under the will to the defendants, sustained their motion, and ordered the petition to be dismissed; whereupon the petitioners appealed.

TAYLOR, C. J. The testator had a wife and four children; two of whom, by a former wife, lived separate from him without his consent. The bulk of his property consisted of the tract of land on which he lived and a very inconsiderable personal estate which was exhausted in the payment of his debts. In his will he manifests his displeasure towards his two elder children by giving them a shilling each; influenced, no doubt, by the common but erroneous notion that it is necessary to give something to a child in order effectually to disinherit him. After these bequests it is quite improbable that he meant to die intestate as to his real estate, so as to let these two children share with the others; and where the intent is so apparent too much stresss ought not to be laid on the strict significance of words. He could not but know that his personal property was inadequate to the support of his wife during her widowhood, and that a remainder of it to his younger children would (76) be illusive. The words "what I may die possessed of" have been held sufficient to describe property of whatever description. 8 Vesey, 606. And the words "all I am worth" are sufficient to pass real estate. 1 Bro. C. C., 437. The petition must be

Per Curiam. Dismissed.

Cited: Clark v. Hyman, 12 N. C., 385.

REBECCA WILSON v. HIGHTOWER and Others.—From Lincoln.

Land given to a child by way of advancement shall not be brought into hotchpot upon his claiming a share of the personal estate. Legacies given by testator's will cannot be brought into account in the distribution of personalty as to which he died intestate.

Petition heard before *Nash, J.* The petitioner set forth that William Wilson died in 1817, leaving a widow and children, of whom the petitioner was one, and leaving also a last will and testament by which he appointed Hightowner his executor, who qualified as such; that William Wilson, one of the defendants, son of William, deceased, had received from his father in his life time an estate of 350 acres of land by settlement; and the other children, who were defendants, had received under the will of their father—the one 600 acres of land and a negro, the other 350 acres and a negro; that besides this property, William Wilson, the father, died possessed of personal property, which he did not dispose of by will, to the amount of $1,752, of which the defendant Hightower took possession; that the petitioner was entitled to nothing under her father's will, and had received from him, in her lifetime, property of the value of $74; that an inventory of this property was made out, sworn to, and presented to the executor. The petition charged that the widow (77) was provided for, and that the shares of the children were more than their proportionate shares of their father's estate; and the petitioner claimed to be entitled to that portion of his estate of which her father died intestate.

The court decreed that the petitioner should have equal distribution with the widow and the other children of the property undisposed of by will, and that petitioner should pay her own costs and those of the defendant Hightower, and that the other defendants should pay their own costs; whereupon petitioner appealed to this Court.

TAYLOR, C. J. All the defendants in this case claim the property under the will of their father, except William, who received a tract of land by way of advancement, as to which, if the question had been undecided, I should have thought it was to be brought into hotchpot upon his claiming a share of the personal estate. But though I did not concur in the decision of *Jones v. Jones,* 6 N. C., 150, I feel myself bound by it, more especially as many estates have been divided according to it, and the unsettling the law at this time would lead to much confusion. On this ground, and this alone, I am of opinion that the land claimed by William as given him in the lifetime of his father, is not the subject of distribution when a claim is made for the personalty. As the act of 1766 required only that property to be brought into hotchpot which has been settled or advanced to the child in the *lifetime* of the parent, it necessarily excludes all that which passes by will; and all the children are, consequently, entitled to a distributive share of the personal property of which William Wilson, the father, died intestate, and the judgment of the Superior Court must be affirmed. As the words of the act of 1784, by which the descent of lands is regulated, are not restricted to an act in the lifetime of the parent, a different construction has been made in regard to the settlement of lands, but respecting which no (78) question arises in this case.

HALL, J. I was one of the Court that decided the case of *Jones v. Jones,* 6 N. C., 150. I was in the minority; but I consider myself bound by that decision, because many estates have been settled and are now held under it. On that account, in the present case, the real and personal property cannot be blended together.

Nor do I think that legacies given by the testator's will can be brought into the account under the law of distributions. As it appears that there were no advancements made by the testator in his lifetime, I think division can only be made of such property as the testator has made no disposition of, and as to which he died intestate. Let the judgment below be affirmed.

HENDERSON, J., concurred.

Cited: Ford v. Whedbee, 21 N. C., 21.

HODGES v. McCABE.—From Tyrrell.

A levy on land was made before the death of the owner; dower was afterwards allotted to the widow in the land, and afterwards the sheriff conveyed to the purchaser at his sale: *Held*, that the widow could not have dower, because the sale related back to the levy or *teste* of the writ.

EJECTMENT. James McCabe was in his lifetime seized in fee simple of the premises described in plaintiff's declaration, and, being so seized, judgment was obtained against him at January session, 1820, of TYRRELL County court. On this judgment execution issued, bearing *teste* of that term, was levied by the sheriff upon the premises on 20 January in the same year. In February following James McCabe (79) died intestate, and on 29 March the land was sold by the sheriff to James Hoskins at public sale to satisfy the execution, and in September, 1823, the sheriff executed a deed of conveyance to Hoskins therefor. Afterwards and before the action brought, Hoskins conveyed to one Tarkinton, and Tarkinton to the lessor of the plaintiff. The defendant is the widow of James McCabe, and she, after the death of her husband, before September, 1823, exhibited her petition for dower in the county court of Tyrrell, and part of the land above mentioned was duly and properly allotted her for her dower, and of that part, and no other, she is in possession. These facts were found subject to the opinion of the court: if it should be that the land was subject to the defendant's dower, then the verdict to be set aside and nonsuit entered; otherwise, judgment to be rendered for the plaintiff.

Badger, J., who presided, was of opinion for the defendant on the matter reserved, and directed the verdict to be set aside and a nonsuit entered, whereupon the plaintiff appealed to this Court.

HALL, J. I think, in this case, the widow is not entitled to dower. The levy on the land was made before the death of the husband, and when the sale was made by the sheriff it related back to the levy on *teste* of the writ.

The reasons given by *Judge Haywood,* in *Winstead v. Winstead,* 2 N. C., 243, are in my opinion, in point and unanswerable, and to them I beg leave to refer.

And of this opinion was Judge HENDERSON.

TAYLOR, C. J., *dissentiente:* It is with reluctance that I give an opinion in this case, without having heard the question argued, which might have removed the doubts I entertain and enabled me to (80) give a decided judgment. At present I can only say I am not prepared to concur in the opinion of the Court, and will briefly state the difficulties which present themselves to me. I incline to think that the husband died seized of this land, and that, upon his death, the title to dower accrued to the widow, which could not be divested by the subsequent sale. That a levy is a lien on the property for certain purposes cannot be denied, and that it would protect it against the alienation of the husband, and give priority to the creditor amidst conflicting claims, must also be admitted; but I know of no authority for the position that it evicts the owner or takes away seizin, which can only be by a deed executed by himself or by the sheriff under the authority of the law.

But if, before that is done, the right of the wife to dower becomes consummate by the death of the husband, a subsequent sale cannot divest her right.

More effect cannot be ascribed to a levy upon land than to a levy upon chattels; and there, we are told, from the best authority, that neither before the *statute of Charles* nor since is the property of the goods altered, but continues in the defendant till the *execution executed.* 2 Eq. Ca. Abr., 381; 4 Term, 536. So that where two writs of *fi. fa.* were delivered to the sheriff on the same day by different parties, and he executed the second first, it was holden that the second execution was good, and bound the goods, but that the sheriff had thereby made himself liable to the first party.

As a creditor, claiming under a posterior execution, may by vigilance obtain satisfaction, notwithstanding the prior lien, why may not a widow be entitled to her dower, claiming as she does under a right created by law, and one which the law contemplates as being free from the demands of creditors? But may it not be safely affirmed that less effect belongs to a levy upon lands than upon chattels? Can it be that a sheriff going upon land and indorsing a few words upon an execution takes away the seizin of the defendant? He cannot (81) turn the defendant out of possession and put the purchaser in, even after a sale; but the latter must resort to an ejectment.

The levy gives the sheriff no right to possession; it will not even amount to color of title, accompanied with possession; and a court of great respectability has decided that *"A seizure of lands by the sheriff does not divest the estate of the debtor."* 8 Johns., 520.

Although a sale upon execution relates back to the test of the writ, as between the parties, yet it is a rule, with respect to the doctrine of relation, that it shall do no wrong to strangers.

It is a fiction of law adopted for the furtherance of justice, and would in this case overreach all mesne liens created by the debtor himself, and, to a certain extent, all others by subsequent executions. But the dower of the wife is a right attached to her condition, which becomes consummate by the death of the husband. It is a right derived from the law, independent of any act or assent of her husband, and ought not to be overthrown by a fiction.

Fictions have been resorted to to sustain the widow's right to dower, which was favored by the common law, but never to subvert it. 3 Coke, 25. *Butler and Barker's case.* In *Manville's case* it is said that by relation a thing may be considered as annulled *ab initio* between the same parties to advance a right; but the law will never make such a construction to advance a wrong or to defeat collateral acts which are lawful, and principally if they concern strangers. 13 Coke, 21.

It is also ruled in *Lifford's case,* 11 Coke, 51, that where a person is disseized, the disseizee, after reëntry, can maintain trespass against the disseizor; for the law as to the disseizor and his servants will suppose the freehold to have continued in the disseizee. But not so with (82) respect to strangers, who came in by right or title under the disseizor. They cannot be made trespassers by relation. So it has been held in this Court that a sheriff's deed for land, sold under an execution, does not relate back, even to the sale, so as to make a man a trespasser who entered between the sale and the conveyance. *McMillan v. Hofley,* 4 N. C., 186.

These are some of my doubts which I have thus thrown out, that if the question should again occur, and we should have the advantage of an argument, they may be considered, if deemed worthy of it.

Cited: Frost v. Etheridge, 12 N. C., 30.

ROBBINS AND SAVAGE v. LOVE.—From Cumberland.

A., being indebted to B. in the sum of $1,000, conveys to B. a house and lot to satisfy the debt, and the consideration in the deed is expressed to be $1,000. B. sues A. for the debt: *Held,* that A. may show the consideration of the conveyance, for it does not contradict any averment in the deed, but is evidence of a distinct fact.

Action for goods, wares, and merchandise sold and delivered. A witness proved the sale of the articles, and that there remained due on such sale $1,000. The defendant offered in evidence a deed of bargain and sale, made by him to the plaintiffs, for a house and lot in consideration of the sum of $1,000. The defendant proposed to prove by plaintiff's witness, who was a subscribing witness to the deed, that it was made to and accepted by the plaintiffs in payment of the goods sold;

but the court refused to hear the testimony, because it would contradict the written agreement in the deed, which stated the consideration to be money, not goods, wares, and merchandise; and a verdict was rendered for plaintiffs for $1,000, with interest and costs. A (83) new trial having been refused and judgment rendered, defendant appealed.

HALL, J. When, originally, the defendant received the goods from the plaintiffs, he became their debtor to the amount of *one thousand dollars,* and for and in consideration of that *one thousand dollars* it was agreed that the house and lot should be conveyed to the plaintiffs by the defendants. There was certainly a thousand dollars in the hands of the defendant, belonging to the plaintiffs, when the deed was executed. The defendant acknowledges that he has received that sum from them. I can see no objection to the inquiry how that thousand dollars came into the defendant's hands; whether the plaintiffs paid it to him, or whether it was the price of the property which they let him have, or how otherwise. It is clear he had it, and owed it to them; and I cannot think it is contradicting the deed to show that it came into his hands as the price of goods sold to him.

Again, the simple contract was that the defendant should convey the house and lot to the plaintiffs for $1,000, which he owed them for goods sold to him. Accordingly the deed has been executed, conveying the house and lot to them, and the consideration therein set forth is $1,000. I think the defendant is at liberty to prove the contract; that it was agreed that the conveyance of the house and lot should be a discharge of the debt due for goods sold, notwithstanding the only consideration set forth in the deed was $1,000. It is no contradiction of the deed, but it is proving a distinct fact.

PER CURIAM. New trial.

Cited: Lane v. Wingate, 25 N. C., 332; *Mendenhall v. Parish* 53 N. C., 107; *Perry v. Hill,* 68 N. C., 420; *Ivey v. Cotton Mills,* 143 N. C., 184.

(84)

WILCOX & CO. v. HAWKINS.—From Warren.

1. Whenever it appears on the face of the pleadings that there are other parties to the contract who are not joined in the action as plaintiffs, it may be demurred to or taken advantage of in arrest of judgment; and if the objection do not appear on the face of the pleadings, but is shown in evidence, it is a proper cause of nonsuit on the general issue.

2. The omission in the writ of the name of a party plaintiff may be amended on seasonable application to the court below, but this Court has no power to amend in such case.

ASSUMPSIT, brought in the name of John V. Wilcox, Arthur Johnson, and Major Drinkard, merchants, under the firm of "John V. Wilcox & Co.," and the plaintiffs declared: First, as assignees, upon a special promise of defendant, at the time of his assignment of a bond, drawn by one Banks, for $1,050; second, upon a general assignment. They then offered in evidence the bond of Banks, payable to the defendant two days after 2 October, 1819, with the following indorsements, which were proved:

"November 6, 1819. I assign the within to Hinton & Brame.
J. H. HAWKINS.

"Pay to J. V. Wilcox & Co.
HINTON & BRAME."

And on the trial of the cause below it was shown that the present plaintiffs composed the firm of "Wilcox, Johnson & Co.," and that the firm of "J. W. Wilcox & Co.," was composed of John V. Wilcox and Thomas Wilcox. Whereupon, on motion, the plaintiffs were called, and nonsuit; and motion for new trial having been overruled, the plaintiffs appealed to this Court.

TAYLOR, C. J. This suit was brought in the name of the three persons specified in the writ, viz., Wilcox, Johnson, and Drinkard, under (85) the firm and description of "John V. Wilcox & Co."; but the plaintiffs show from their own evidence that "John V. Wilcox & Co." was a firm composed of John V. Wilcox and Thomas Wilcox; consequently one of the persons with whom the contract was entered into was not made a party plaintiff. Whenever it appears on the face of the pleadings that there are other parties to the contract who are not joined in the action as plaintiffs, it may be demurred to or taken advantage of in arrest of judgment. And if the objection do not appear on the face of the pleadings, but is shown forth in evidence, it is proper cause for nonsuit on the general issue. 1 Saund., 153, n. 1. Further, to give the plaintiffs a cause of action against the defendant it was necessary for them to show that John V. Wilcox & Co., as described in the writ, had prosecuted a suit against Banks; whereas, they show a suit prosecuted against him by John V. Wilcox and Thomas Wilcox, under the firm of John V. Wilcox & Co., which appears to have been correct, according to the contract, but altogether variant from the shape in which the plaintiffs have described themselves in this action. It is an evident mistake in filling up the writ, and might have been amended on a seasonable application in the proper court; but we have no power to do so here, however we may regret that the justice of the case should be entangled in form. The nonsuit was properly awarded, and the judgment must be

PER CURIAM. Affirmed.

Cited: *Green v. Deberry,* 24 N. C., 345; *Justices v. Simmons,* 48 N. C., 190; *Hodge v. R. R.,* 108 N. C., 34.

NICHOLS TO THE USE OF HARRELL v. BUNTING.—From Robeson.

1. A. gave to B. an instrument of writing stating that he had received from B. a deed for land, for which he was to pay B. $50 if he would take that sum before any decision was made as to the right of the land; but if B. would wait until A. could procure a decision, according to law, so that he (A) would recover the land from the tenant in possession, he then promised to pay him $100: *Held,* that this contract was not subject to the imputation of maintenance, but that a recovery might be had thereon.
2. It is not the nature of the claim purchased, that is, whether assignable or not, but its being a dormant one, and such an one as the possessor would not himself have prosecuted, which gives to the transaction the character of maintenance.

THIS was an action of debt for $100, upon the following instrument:

LUMBERTON, 13 June, 1820.

Received of John Nichols a deed for 400 acres of land, which he purchased at sheriff's sale as the property of Benjamin Blount, for which I am to pay him $50, if he thinks proper to take that sum, before any decision respecting the right takes place. Or, if he thinks proper to wait until I can procure a decision according to law, and I recover the land from Benjamin Blount, the present tenant in possession, and William Townsend, Jr., who has a deed for the said land from Elisha Cumbo, so that I have a good and clear title in law, I hereby agree and bind myself, in that case, to pay the said John Nichols, his heirs and assigns, the sum of $100, and no more.

In witness whereof I have hereunto set my hand and seal the day and date above written.

RICHARD C. BUNTING. [L. S.]

To which the defendant pleaded "general issue; payment; set-off." The plaintiff proved the sealing and delivery of the above instrument by defendant; whereupon the defendant's counsel objected to the plaintiff's recovery on the ground that the contract was contrary to law and void upon its face; and, the court being of that opinion, the plaintiff was nonsuited.

A rule for new trial was obtained, which, on argument, was
(87) discharged, and the plaintiff appealed to this Court.

HENDERSON, J. Maintenance consists in stirring up, promoting, or encouraging contentions and quarrels, as well in the country as in courts of justice. It is unnecessary to consider the various acts which in law have been adjudged to amount to this offense; but I shall confine myself solely to that class of them which relates to the offense of purchasing a right of action, or, as it is called, a right of going to law. To purchase a dormant title and to bring suit on it is said to be maintenance—that is, a title which the proprietor through choice would not have set up, but suffered to have slept, but for the officious intermeddling of the purchaser, who has caused a lawsuit to be brought for what the person really injured would have permitted to pass unnoticed; and this, whether the title be good or bad. And a person may be guilty of maintenance in purchasing a negotiable security, as a bill of exchange or promissory note, as well as a mere chose in action, or right of suing, not transferable by assignment or any other method; for it is not the nature of the claim, that is, whether assignable or not, but its being a dormant one (by which I do not mean an old one, only) and such an one as the possessor would not himself have prosecuted, which gives to the transaction the character of maintenance. The claim, being old or dormant, is only matter of evidence that the party did not mean to assert it. "Bac. Ab. Maintenance," where it was held not to be maintenance for the purchaser to carrry on a suit (for a trespass) commenced before the purchase. But the daily practice of our courts is the best exposition of the law. We see in every court, from the highest to the lowest, suits carried on by purchasers of mere choses in action, in the name of the original proprietor
or legal owner, the thing which they purchased not being assign-
(88) able; and until a very few years ago that equitable right was
recognized in our courts of law, both here and in England, and when such cognizance of these equitable rights was disannexed it was on very different grounds from those of encouraging maintenance; and it is every day's practice to have two demises in a declaration in ejectment, one the title of the vendor and one on that of the vendee, whenever there is any doubt as to adverse possession at the time of the sale. Our courts would not permit such a thing if the bare buying a disputed

title, a litigious right, was a maintenance; to which may be added that it is a principal branch of equity practice to protect and enforce purchases of choses in action. I am satisfied that there should be a new trial.

And HALL, J., was of this opinion also.

TAYLOR, C. J. This contract appears to me to be founded on a consideration perfectly just in itself, and reconcilable, on a correct view of the authorities, and with the most authentic exposition of positive law. The proper definition of maintenance entirely excludes this case from all participation in its criminality; it signifies a malicious or, at least, an officious interference in a pursuit of which the party has no interest to asssist, either with money or advice, to prosecute or defend the action. 4 Bl. Com., 134.

The common-law maxim is that nothing in action, entry or reëntry, can be granted; the reason assigned is for the avoiding of maintenance, supporting of rights, and stirring up of suits; for so, under color thereof, pretended titles might be granted to great men whereby right might be trodden down. Co. Litt., 214. Now, although nothing passed by this deed so as to enable this defendant to recover in his own name against the tenant in possession, yet it passed such an equitable title that, in the event of a recovery, a court of equity would have completed his title by decreeing a deed. The policy of the common (89) law forbade that a tenant should alien his fee or tenure without the consent of the lord, or that the lord should alien his seignory without the consent or attornment of his tenant. A feoffment was void without livery of seisin, and possession was necessary to enable a man to make livery of seisin. But if the deed were even an act of maintenance, yet as between the parties to it it was effectual. Nichols could not recover the land, in opposition to his deed to Bunting, for, as an alienor, it is an estoppel; for it seems to be thought that a feoffment upon maintenance, or champerty, is good as between the feoffer and feoffee, and is only void against him who hath right. Co. Litt., 369a; Cro. Eliza., 445.

The strict doctrine of the common law in regard to maintenance would be fraught with inconvenience if applied in all its rigor to the existing circumstances of this State. Here a considerable portion of the land remains, in a great degree, uncultivated and in many instances remote from the observation of the owner. Partial settlements may be made upon it, and possession held, the precise extent of which may be unknown to the owner and difficult to ascertain, from ignorance of the claim of the adverse tenant or the uncertainty of the boundaries. If, believing himself to be in the constructive possession (a term well understood), he sells his land, and the purchaser cannot recover the land from the person in possession, nor his purchase money from the vendor, on account of the illegality of the contract, very great injustice will be the effect. In England the lands are all actually possessed either by the owner himself or by some one under his authority; and it can scarcely happen there that a man can ignorantly sell land of which another is in the adverse possession. Yet even there the law is much relaxed (90) from its ancient strictness, and the old rule, that for avoiding maintenance a chose in action cannot be assigned or granted over to another, is so diluted by exceptions as to amount only to this, that the grantee or assignee of a deed or bond cannot sue in his own name. But he may sue in the name of the assignor or grantor, and the court of law will consider the assignment of an apprentice, or an assignment of a bond, as things which are good between the parties, and as contracts which the law will recognize. But what comes nearer to the present case is that the assignment of a chose in action is a good consideration of a promise; and if, instead of a bond, the defendant in this case had promised to pay the money in the event of a recovery being had against Blount, he would have been bound by such promise. Sid., 212; 2 Bl. Rep., 820. So an assumpsit, in consideration of a conveyance to A. as he shall appoint, of all the lands called B., though it be said that the plaintiffs had nothing in the tenements (2 Lev., 33), and in consideration of the release of an equity of redemption. Ld. Ray., 662.

In this case the consideration was the transfer of a right to the defendant which, by the subsequent sanction of the law, he was enabled to enjoy, and which it was not in the power of the plaintiffs to deprive him of under any circumstances. It is difficult to conceive what would form a consideration for a promise if this would not.

But, independently of any other view of the case, an adverse possession ought not to be presumed, but a holding over and claiming possession against the owner ought to be proved. The sheriff, having conveyed all the title of Blount to Nichols, who thereby became tenant in fee, it is possible that the possession also would have been surrendered if demanded; at least, the contrary does not appear. In such a case Blount must be considered as tenant at will to Nichols, whose (91) alienation of the land is not the transfer of a mere right, but amounts to the determination of the estate at will. 2 Bl. Com., 146; 1 Johns., 45.

There must be a new trial.

Cited: Morgan v. Bradley, post, 560.

McNEILL v. MASSEY.—From Cumberland.

1. In questions of boundary marked lines or trees are more certain than course and distance, and therefore shall control them. Accordingly, where there has been a long and continued possession up to lines variant from those called for in the grant, and it appears that such lines were recognized as the true lines of the grant by several adjoining patents; these are facts which point to something controlling the courses and distances of the grant, and should therefore be submitted to the jury to draw from them such inference as they may think proper, because boundary is matter of *fact*.
2. A judge is not bound to charge on all the points in a case; he may be silent if he will, unless called on by one of the parties to express his opinion on a point of law; but where he passes over one point, which is preliminary, to get at another, which could not fairly arise until the first is disposed of, it is error.

TRESPASS *quare clausum fregit,* tried before *Norwood, J.* The plaintiff proved himself in possession of the land in dispute, represented on the annexed diagram by the letter H, and that the defendant entered upon it and pulled down his fence.

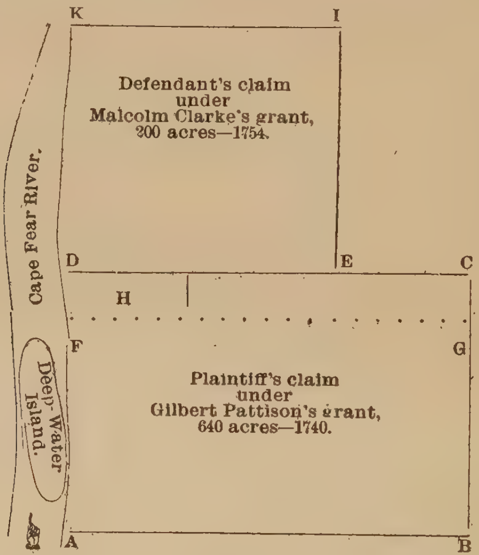
The defendant justified under a patent granted to Malcolm Clarke, in 1754, for land described as follows: "Beginning at a red oak in Gilbert Pattison's corner, thence along said Pattison's line N. 45 E. 206 poles to a pine, thence N. 45 W. 197 poles to a stake, thence S. 45 W. 114 poles to a small white oak on the river, thence down the river to the place of beginning," and regularly deduced title from the patentee, through his father to himself, for the same land.

The plaintiff then produced a patent granted to Gilbert Pattison in 1740, for land described as follows: "640 acres lying and being in the county of Bladen, on the northeast side of the Northwest River, beginning at a Spanish oak on the river bank, below Deep Water Island, at the upper corner of Nathaniel Linglie's land, thence by the said Nathaniel's land, N. 45 E. 85 chains to a stake, thence N. 45 W. 80 chains to a stake, thence S. 45 W. 70 chains, then along the river to the first station," and showed a regular title down to himself for the same land. (92)

Each party had been in possession under their respective patents from the date thereof; but as to the part in dispute there was no direct proof of actual possession prior to the year 1806, at which time the defendant's father was in possession, and continued so until 1819, when defendant's father and plaintiff having disputed about the right of possession, it was referred to arbitrators, who awarded the land in dispute to plaintiff, who thereupon went into possession and has since so continued.

The principal point in the case was whether the upper corner of the Pattison patent was at F or D; the plaintiff contending for D and the defendant for F. Plaintiff also insisted that if he had a possession anterior to 1806 of twenty-one years, it made good his title under the act of 1791, although the upper corner of Pattison's patent might originally have been at F.

The testimony as to the lines C D and F G was that both were run in 1819, and at that time were both found to be forty-six years old, and on the line C D at the point E a stake and pointers were found corresponding in date with the trees on C D and F G. If the Pattison patent were run according to course and distance, it would not extend to the lines B C or F G.


K
I
Defendant's claim under Malcolm Clarke's grant, 200 acres—1754.
Cape Fear River.
D
E
C
H
F
G
Deep-Water Island.
Plaintiff's claim under Gilbert Pattison's grant, 640 acres—1740.
A
B

The jury were instructed that they were not at liberty to depart from the course and distance of the Pattison patent, after leaving (93) Linglie's line, except to pursue some old marked line, which they believed corresponded with the date of the Pattison patent, and was the line actually run when the land was located, as the only description in that patent was course and distance. And also, that the plaintiff, in making out title, under the act of 1791, must show that he had been in possession for twenty-one years, under known and visible lines and boundaries, and that, in so doing, he would be restricted to the first marked line, viz., F G, unless they believed there was another line which was the true one; and that in the present case it was the opinion of the court that the plaintiff could not claim beyond the line F. G. Verdict for defendant. A motion for a new trial was made and refused; judgment, and appeal.

There were adjacent tracts which appeared from the plat in the case to be coterminous with the Pattison grant, but the calls of those adjacent grants were not given.

Gaston for defendant.

Henderson, J., delivered the Court's opinion.

In our exposition of the boundaries of a grant, or a conveyance of lands, we very properly say that marked trees or lines, being more certain than courses and distances, shall control them. This the presiding judge recognized as law; but the effect of his charge, although he may not have designed it, is to require proof direct of these facts, whereas, like all facts, they may be inferred from other facts if the fact proven be relevant to the fact to be inferred. The facts set forth in the record show a long and continued possession up to lines variant from those described by the courses and distances called for in the grant, and from the plat accompanying and forming a part of the case these lines were recognized as the lines of the patent by several adjoining patents. This latter fact does not very distinctly appear, for the calls of the latter patent are not given; but they are laid down on the plat as bounded by such lines. These facts pointed to something which controlled the courses and distances of the grant. Whether they proved that marked trees were once there is an inference of fact which belongs to the jury. All that the court can say is that they are relevant to such an inference and that the jury may, if they think proper, make it. If such was not the law, most of our patents would change their locality as our marked trees decayed and our proofs direct of their having once stood there were lost. I think that there should be a new trial, the judge not having called the attention of the jury to this point; not that there should be a new trial because the judge did not charge on any or all the points in a case; he may be silent if he will unless called on by one of the parties to express his opinion on a point of law. But where he passses over one point to get at another, and where the point passed over (as in this case) is preliminary to the one passed to, there it is error; for the latter point could not arise until the prior one was disposed of; that is, in this case the jury could not lay down the patent by course and distance if there were originally *maked lines and trees*, to which circumstance the evidence pointed. I am very far from saying that here was evidence sufficient to prove that there were once marked lines; it is not my province. All that I say is that there was enough to leave it to a jury.

Cited: Norcum v. Leary, 25 N. C., 54; *Icehour v. Rives,* 32 N. C., 259; *S. v. Rash,* 34 N. C., 386; *S. v. Langford,* 44 N. C., 444; *Boykin v. Perry,* 49 N. C., 327; *Murray v. Spencer,* 88 N. C., 360; *Brown v. House,* 118 N. C., 883.

(101)

INGE v. BOND & SLAUGHTER.—From Warren.

1. In an action for deceit in the sale of an unsound negro the declaration stated a false affirmation to have been the means by which plaintiff was induced to make the bargain; and the making such affirmation, with a knowledge of its untruth, constituted the *gravamen: Held,* that the action was conceived in case, on tort, and the declaration was held good.
2. In some cases an affirmation as to the title of a chattel, where the seller is in possession, is a warranty as to *title;* but as to *soundness* an affirmation does not amount to a warranty unless it appear on the evidence to have been so intended.

CASE. The declaration contained two counts. The first charged that whereas Francis Inge bargained with John Bond to buy of him a certain negro man slave named Harry, "and the said John Bond and Ebenezer Slaughter, well knowing the said negro man slave Harry to be infirm, unsound, and afflicted with a disease of the liver, by then and there wrongfully, falsely, and deceitfully affirming the said negro slave Harry to be sound and free from any disease whatever, then and there procured a sale of the said negro slave Harry to the said Francis Inge for the sum of $400; which said negro slave Harry was at the time he was sold, and from that time to the time of his death continued infirm, unsound, and afflicted with the aforesaid disease of the liver, to wit, at, etc., and so the said John Bond and Ebenezer Slaughter falsely and fraudulently deceived the said Francis Inge, etc."

The second count charged that "The said John Bond and Ebenezer Slaughter, intending to deceive and defraud the said Francis Inge, did wrongfully and deceitfully advise and persuade the said Francis Inge to buy of the said John Bond a certain negro man slave Harry (102) for the sum of $400, and did then and there, for that purpose, falsely affirm to the said Francis Inge that the said negro slave Harry was sound and free from any disease whatever, and did thereby deceitfully procure the said Francis Inge to buy the said negro slave Harry of the said John Bond at the price and for the sum of $400 aforesaid; and the said Francis Inge avers that, confiding in the said affirmation of the said John Bond and Ebenezer Slaughter to be true, and not knowing to the contrary, he did afterwards, to wit, etc., purchase and buy the said negro man slave Harry at the price and for the sum of $400 as aforesaid, which sum he paid to the said John Bond accordingly; whereas, in fact, the said negro slave Harry was at the time of making the affirmation aforesaid of the said John Bond and Ebenezer Slaughter not sound and free from disease; but was infirm, unsound, and afflicted with a disease of the liver, and that the said John Bond and Ebenezer Slaughter well knew the same, viz., at, etc.; and the said Francis Inge further says that said negro slave Harry from the time of the sale aforesaid to the time of his death continued infirm, unsound, and afflicted with the said disease of the liver, etc.; and so the said John Bond and Ebenezer Slaughter false and fraudulently deceived the said Francis Inge, etc. Wherefore," etc.

A bill of sale was given for the negro which contained no warranty of soundness; and it was in evidence that Bond expressly refused to sign a bill of sale containing such warranty. There was also evidence given below of repeated conversations as to the soundness of the slave; but all these took place before the execution of the bill of sale.

The judge charged the jury that to entitle the plaintiff to recover it was necessary that the evidence should satisfy them that the defendants, or either of them, had a knowledge of the unsoundness of the negro and failed to disclose it at the time of the sale. The jury (103) found a verdict against Bond, and for Slaughter; and a new trial having been refused Bond, he appealed to this Court from the judgment rendered against him.

Hogg for appellant.
Hillman contra.

TAYLOR, C. J. The first count in the declaration charges that the defendants, knowing the slave to be unsound, by a false affirmation of his soundness procured a sale of the slave to the plaintiff. The second charges that the defendants advised the plaintiff to buy the slave, and, falsely affirming him to be sound, procured the plaintiff to buy him; whereas they knew the slave to be unsound. In both counts the false affirmation is stated to be the means by which the plaintiff was induced to make the bargain, and the making that affirmation with a knowledge to the contrary, whereby the plaintiff was injured, constitutes the cause of action. The action is clearly conceived in case, on *tort,* and the declaration as strongly marked with those features, as in *Pasley v. Freeman,* 3 Term, 51, the foundation of which is fraud and deceit in the defendant and damage to the plaintiff. The affirmation, as stated in the declaration, is not laid in the way of a contract, the breach of which has brought damage on the plaintiff, but as a deceit practiced

upon him, whereby he was induced to make the contract. In some cases it is true that an affirmative as to the title of a chattel, when the seller is in possession, will be considered as a warranty, for as to the title the law itself implies a warranty; and even without such information, if a man sell goods as his own and the title prove deficient, the buyer may recover satisfaction. 2 Bl., 451. But as to the soundness of goods, an affirmation does not amount to a warranty unless it appear on the evidence to have been so intended. In declaring on a warranty, the charge is laid in *assumpsit,* either *warrantizando vendidit* or he undertook and faithfully promised. But in this case there is nothing like a
(104) promise and undertaking. And what shows beyond all controversy that the action was not intended to be on a warranty is that a bill of sale was given without a warranty, and that Bond expressly refused to enter into one. That no contract existed is further evident from this, that whatever was said concerning the soundness of the slave was before the sale, and the true contract of the parties was reduced to writing by the bill of sale, to which no other terms or stipulation can be added. "I hold," says one of the judges, "that if a man brings me a horse, makes any representation whatever of his quality and soundness, and afterwards we agree in writing for the purchase of the horse, that shortens and corrects the representations; whatever terms are not contained in the contract do not bind the seller, and must be struck out of the case." 4 Taunton, 786. But if there is any fraud in the case, *that* cannot be done away by the contract, and the buyer may, notwithstanding, bring his action on the case, which is the only one that could be brought in this case. It, therefore, seems to me that those authorities do not apply which go to show that a breach of contract cannot be converted into a *tort,* for in all of them there was a clear contract, and in the leading ones the defendants had a joint ownership in the property. I do not think it was in the least degree necessary that it should be left to the jury to say whether the affirmation stated in the declaration was made by the defendant or not, since it was merely inducement and introductory to the *gravamen,* which is the fraudulent concealment of a defect in the slave; and, generally, where a person is sued *in tort* for knowingly selling an unsound article, the charge is laid either with a false affirmation of the soundness or that the defendant sold it for and as a sound article, or with a false warranty, all which terms import the same thing, and are never held as making a contract the gist of the ac-
(105) tion. As the jury have verified the charges in the declaration, I am of opinion that the plaintiff is entitled to recover, and that there ought not to be a new trial.

And of this opinion were the other judges.

Cited: McKinnon v. McIntosh, 98 N. C., 92; *Wrenn v. Morgan,* 148 N. C., 105; *Robertson v. Halton,* 156 N. C., 220; *Hodges v. Smith,* 58 N. C., 259; *Tomlinson v. Morgan,* 66 N. C., 560.

JEFFRIES v. HARRIS.—From Person.

In assumpsit by a physician for his services, defendant shall not call witnesses to prove the general character of plaintiff as a physician.

ASSUMPSIT for services as a physician. Defendant called a witness, a physician, to prove the general character of the plaintiff as a physician. The court rejected the testimony, but permitted defendant to show that the plaintiff had not been regularly educated as a physician.

The improper rejection of evidence formed the ground of a motion for a new trial below, and was one question presented to this Court on the appeal of the defendant.

Another question was presented on the affidavit of the plaintiff, made under sec. 10 of the act of 1777, ch. 115, New Revisal.

TAYLOR, C. J. The affidavit filed by the plaintiff is within the very terms of the act of 1777, sec. 10, and entitles him to judgment for the sum really proved.

The evidence as to the plaintiff's general character as a physician was properly rejected. Character was not put in issue by the nature of this action, and the defendant is equally liable on his assumpsit, whether the plaintiff's character were good or bad; for if he chose to employ him as a physician it is not competent to him afterwards to say that he is not a good one, and therefore, that he will not pay him. If, (106) indeed, the plaintiff had imposed on the defendant by false pretensions to skill, he would have been responsible for any injury done him; but in this case the plaintiff is entitled to compensation for his skill and labor, whatever they might be. The judgment must be

PER CURIAM. Affirmed.

Cited: Lumber Co. v. Atkinson, 162 N. C., 302.

FREE JACK v. WOODRUFF.—From Surry.

In an action by a man of color for his freedom, defendant offered in evidence a record to show defendant to be a slave; from which it appeared that the proceedings of an inferior court on a *habeas corpus* pronouncing him free had been reversed on the ground of want of jurisdiction in the inferior court. To rebut any unfavorable inference from this record, the plaintiff was permitted to give in evidence the declarations of one not a party to the record, but who had possession and claimed title to the plaintiff under the party to the record of reversal at the time the declarations were made.

TRESPASS *vi et armis*, alleging an assault and false imprisonment, brought by the plaintiff, a man of color, against the defendant, to recover his freedom. The defendant pleaded that plaintiff was a slave, to which there was a replication and issue. Verdict for plaintiff.

The plaintiff was the child of a woman of color named Jane Scott who, in 1774, was in the possession of one Allen. Allen stated that she was free, and while in his possession she acted as a free woman. In 1784 the plaintiff was indented by Surry County court as a free boy to one Meredith, who frequently said he was free, but at length sold him to one Moses Woodruff. Woodruff afterwards sold him, and stated that he was reported to be a free boy; the purchaser must take (107) him at his own risk. Allen, after making the declarations above stated, sold Jane Scott to one Cresong, who sold her, together with twelve of her children, including the plaintiff, to William Terrill Lewis on 22 October, 1788; and Lewis carried or sent such of the children as he had in his possession (Jack not being one of them) out of the State, assigning as a reason for so doing his fear that if they remained he should lose them. The declarations of Lewis were objected to by defendant, but the court received them. Verdict for plaintiff; new trial refused; judgment, and appeal to this Court.

On the trial below the defendant, to show that Jane Scott was a slave, introduced a copy of a record from Salisbury Superior Court, from which it appeared that Jane Scott and her children had been released and set at liberty as free persons, on a writ of *habeas corpus*, returned to Surry County court, and the judgment of Surry County court had been reversed by Salisbury Superior Court, on the ground of want of jurisdiction in the county court.

Cresong (who sold to Lewis) was a party to this proceeding, and on the same day on which he sold to Lewis executed a power of attorney to him, by virtue of which Lewis received the negroes from the sheriff, on the process issuing upon the reversal of the judgment, and while the negroes were thus in his possession he made the declarations which were given in evdience.

Gaston for defendant.
Ruffin contra.

HALL, J. The judgment and proceedings on this writ of error in the Salisbury Superior Court, reversing the judgment of Surry (109) County court, by which Jane Scott and her children were restored to their liberty, was introduced by the defendant to prove that the plaintiff was a slave, he being a son of Jane Scott.

In rendering judgment on the writ of error, the question whether Jane Scott was a slave or not was not examined. The ground of reversal of the county court of Surry was that the county court had not jurisdiction in such cases, but the defendant relied upon it as evidence of his title.

It appears that Abraham Cresong, who was party to that proceeding, did on the 22 October, 1788, convey by deed to William Terrill Lewis the woman Jane Scott and her children, and on the same day executed a power of attorney to said Lewis, under which he received from the sheriff Jane Scott and the plaintiff in consequence of a process issued for that purpose upon the reversal of the judgment of Surry County court. It was whilst Lewis was possessed of Jane Scott and some of her children, perhaps not the plaintiff, and claimed title to them, that he made the declaration which is the subject of the present question submitted to this Court.

I will not say what I think ought to be the judgment of this Court, provided that record had not been offered in evidence by the defendant, and provided it had appeared that William Terrill Lewis was dead; but I must say that as Lewis claimed Jane Scott and her children under Cresong, who had been party to the record when he made the declaration, that it was proper to give that declaration in evidence to counteract any conclusion which might be drawn by the jury (110) from the record unfavorable to the plaintiff.

It will be seen that the conveyance had been made to Lewis by Cresong at the time when judgment was given on the writ of error, and if not the nominal he was the real party to that proceeding; and, as the defendant wished to derive a benefit from the record, it was proper under those circumstances that the declarations of Lewis should accompany it when offered in evidence. I therefore think the rule for a new trial should be discharged.

And in this opinion the rest of the Court concurred.

PER CURIAM. No error.

JORDAN v. JAMES & MARSHALL.—From Cumberland.

1. In proceedings under the act of 1773, for the relief of insolvents, ch. 100, N. R., the single fact to be ascertained is honest insolvency; and when this is ascertained by the mode prescribed, either in the first or third section, the consequence as to the debtor is the same; he is entitled to his discharge from the imprisonment of all creditors under the 39th article of the Constitution.
2. The judgment of discharge of a court of exclusive jurisdiction on the petition of an insolvent, until reversed for error or quashed, is conclusive evidence of the discharge, and its regularity cannot be incidentally questioned.

Scire Facias against the defendants as bail for one Mitchell, to which they pleaded "Payment; death of principal; that Mitchell, their principal, had regularly taken the benefit of the act for the relief of insolvent debtors, and was thereupon duly discharged"; to which the plaintiff replied, *"Nul tiel record."* On the trial of the cause below the defendants produced as evidence of Mitchell's discharge as an insolvent the copy of a record, duly certified, from the office of the clerk of (111) the county court of New Hanover, showing a petition of David Mitchell on 5 June, 1820, to two justices of the peace of said county, setting forth that he was and had been for twenty days in close confinement for debt, and praying that proper steps should be taken for his discharge, under the act of Assembly for the relief of insolvent debtors; that the said justices on 16 June, 1820, commanded the sheriff of said county to bring before them the said Mitchell, with a list of the process under which he was confined, which was obeyed by the said sheriff, and the said justices certified that the said Mitchell, having taken before them the oath prescribed by law for the relief of insolvent debtors, he was thereupon ordered to be discharged on 16 June, 1820. It further appeared from the said record that the said Mitchell was not in prison at the instance of the present plaintiff, though he was notified among the other creditors eight days before his discharge, but that he was in prison at the instance of eleven other creditors, eight of whom were notified on 11 June and two on 10 June, that he would apply on 16 June for his discharge, at 10 o'clock a. m. on said day, and the other creditor was served with a notice on 27 May of the same purport, except that it did not state the day on which he would make application, but that was *blank.* Whereupon the court, being of opinion that there was such a record, gave judgment against the plaintiff, from which judgment the plaintiff appealed to this Court.

W. H. Haywood, Jr., for plaintiff.
Hogg contra.

HENDERSON, J. It is quite apparent that a person discharged (115) from imprisonment for debt, either under the first and third sections of the act of 1773, is only liberated as to those demands for which he was then held in confinement, and from the confinement for which he was discharged. The words of the first section are: "and shall stand forever discharged from all such debts so sued for." The words of discharge under the third section are: "which warrant of discharge shall be an indemnity to the sheriff or jailer for an escape, etc." It was decided in *Burton v. Dickens,* 7 N. C., 103, that a debtor dis- (116) charged under the third section of the act was exempt from arrest for any debt (whether held in confinement for it or not), under the 39th article of our Constitution; the words of which are that the person of a debtor, where there is not a strong presumption of fraud, shall not be confined in prison after delivering up *bona fide* all his estate, real and personal, for the use of his creditors, in such manner as shall hereafter be regulated by law, the court considering the provisions of the act of 1773 as furnishing the regulations spoken of in the article. It, then, only remains to be considered whether there is any essential difference in the effect of a discharge under one or the other section of the act, the principal in the present case being discharged under the first or, as it is called, the forty shilling section. The injunction that the person of a debtor shall not be held in confinement is found where details are not to be expected; fundamental principles only are there embodied, and in this case to be carried into execution (if the words are to be regadred) by some future Legislature. We should, therefore, not construe this article as we would an act of Assembly, and extend it to cases only within its words, but all cases whatever within its spirit within its operation also. By this article a mere insolvent is not entitled to discharge, but an insolvent who has no means of paying. It is the surrender of his property which creates his inability, if he had any property to surrender. The fact to be inquired into is this, his utter inability, and when that fact is ascertained the exemption attaches, no matter whether it arises from a total or partial inability; for if partial inability had made any difference, there most certainly would have been required some proportion between the sum surrendered and the debts from which he was to be discharged. There could not be such difference in the effect of having a few shillings only to surrender and leaving no proportion to the debts to be paid. A person has 41 shillings to surrender, and owes £10,000; and another has only 30 shillings to surrender, and owes (117) £100 to twenty different men. The person of the first shall be discharged from the payment of the £10,000, and the latter shall be liable to nineteen out of twenty creditors, and may be imprisoned for each debt successively if his creditors think proper to sue in successive order. And thus a person who is entitled to his discharge under the first section may, if he thinks proper, by varying the mode of application, obtain his discharge under the third section by surrendering up some trifle not worth 10 cents; and this is the practice under the act, and cannot be objected to. It is not to be presumed that this great difference in the situation should be entirely dependent on the will of the debtor, without any merit or demerit on his part; and if the law requires that the sum surrendered up should bear any proportion to the debts to be paid, then the greater privilege would be reasonable; nor does imprisonment seem to be inflicted as a punishment, for then the period of imprisonment would bear some proportion to the amount due, having a regard to the means of payment, and whether insolvency was brought on by misfortune or imprudence, and many other considerations increasing the criminality or extenuating the misfortune of being indebted beyond the ability to pay. As was said before, the total want of means is the *postulatum* of the act. When that is ascertained there is no difference between a person who has nothing to surrender and one who has only five shillings, or some other small sum. Their situation may properly be more than equalized by the different sums due from each; and the law omitting to make that an inquiry and criterion, when it could be so clearly expressed if designed, is an evidence that it formed no consideration with the lawmakers. I am well satisfied that this constitutional provision, if extended to one, should be extended to the other also. The notice to be given to creditors, which at one time was supposed might vary (118) the case, upon an examination will be found to be nothing. The notices spoken of under the third section as necessary to be given to all the creditors are notices to them to come in and prove their debts and receive their dividends. They are to be given by the clerk; they affect not the previous discharge. As to due notice not being given to the confining creditor, the Court cannot examine that question. We can only look into the discharge and the jurisdiction of the court or magistrate which granted it, for it comes before us incidentally or collaterally, and the magistrate or court was as competent to judge and to act as this or any other court, and their proceedings, when within the sphere of their jurisdiction, are as binding and conclusive as those of the highest tribunal of the country, as long as they remain unreversed. The question of notice came before the magistrate; he passed upon it, decreed it was sufficient, and rendered his judgment. If any person felt himself aggrieved, and could show his interest in the question, and make out a probable cause, the Superior Court would have the proceedings brought before it by *certiorari* or some other writ, and, if contrary to law, would have reversed them, subject to an appeal to this Court. But neither this nor the Superior Court, nor any other court, has the power of examining into the regularity of the proceedings of any court when brought into question collaterally and incidentally, if the thing done was within the legitimate powers of the court doing it. Only a revising court, when the question comes before it directly, has the power to do it.

Cited: Williams v. Floyd, 27 N. C., 660; *Griffin v. Simmons,* 50 N. C., 147; *Rogers v. Kimsey,* 101 N. C., 563.

(119)

DOE ON DEMISE OF TATE'S HEIRS v. SOUTHARD.—From Burke.

Color of title may be defined to be a *writing*, upon its face, *professing* to pass title, but which does not do it, either from a want of title in the person making it or the defective mode of conveyance which is used; and it would seem that it must not be so obviously defective that no man of ordinary capacity could be misled by it.

EJECTMENT. This case was before the Court, *Tate v. Southard,* 8 N. C., 45. The lessor of the plaintiff claimed the land in dispute by virtue of a grant from the State, bearing date 11 October, 1814. The defendant claimed under a sheriff's sale made to one Greenlee, and gave in evidence a copy of a record from BURKE County court, showing that an attachment had been sued out in January, 1784, at the instance of James Greenlee against one Richardson, returnable to January sessions, 1784, with this return: "Attached one piece of land that Richardson bought of Kennedy." At April sessions there was a verdict for the plaintiff, and a writ of *fi. fa.* issued thereon to July sessions, 1784, which was returned indorsed "Satisfied." The defendant then proved by parol evidence that the same tract of land mentioned in the levy of the attachment, and now in suit, was exposed to sale to satisfy the execution, and Greenlee bid off the land. At the time of sale one Nicholson lived upon the land, and it was afterwards occupied at different times by two other tenants. It then continued unoccupied until 1789, when one Hartley took possession and continued it for twenty-five or twenty-six years as tenant of Greenlee. When Hartley moved off, the defendant took possession as tenant under Greenlee. At the time of the sale in 1784, it was believed that the land had belonged to Kennedy, and the defendant introduced copies of several grants for adjoining lands dated respectively in 1779, 1780, and 1783, all of which called for Kennedy's (120) lines or corners, and it was considered and believed by the neighbors that the lines of these several grants, together with one McElworth's, were the lines of Kennedy's land, as these tract bounded it on every side. No grant ever was taken out by Kennedy. The defendant claimed, also, under the act of 1791.

The court instructed the jury that the act of 1791 required a possession of twenty years under known and visible lines and boundaries, and under a color of title; that if they could ascertain from the record produced in evidence that the land in dispute had been sold by the sheriff, that such sale would amount to color of title, and coupled with twenty years possession, under known and visible lines and boundaries, would ripen into a valid title, in which case they ought to find for the plaintiff; but that they must gather the fact of the sale by the sheriff from the record itself, and not from parol evidence.

Verdict for the plaintiff; new trial refused; judgment, and appeal.

HENDERSON, J. Color of title, as applicable to the present subject, is evidently the production of our own country. I would not, therefore, go abroad for an explanation. The name, I presume, was taken from what is called giving color in pleading, which is never used in this State, and not often, I believe, in England. The word is not to be found in the act of 1715. It is first used in our act of 1791. Giving color in pleading is giving your adversary a title which is defective, but not so obviously so that it would be apparent to one not skilled in the law. It must be such as would perplex a layman. It, therefore, draws the consideration of the question from the jury (the lay gents) to the court, which is the object of the pleading. I think we should go no further than our act of 1715—at most, not further than the act of 1791—on the
(121) question we are now investigating. Section 2 of the act of 1715 ratifies and confirms all sales made by creditors, executors or administrators, husbands and their wives, husbands seized in right of their wives, or by indorsement of patents, *or otherwise*, where the possessor shall have been in possession for seven years. The act of 1791, confirming possession against the State, uses the same phraseology, except that the words, "*other colorable title*," are substituted for the words "*or otherwise*," used in the act of 1715. The words, "or otherwise," and "other colorable title," mean title of the *like* kind. Those mentioned in the act are all written ones; are all such as, upon their face, profess to pass the title; in some of them conveyance is *sufficient* to pass the title, but the *defect* lies in the want of title in the grantor. In the last instance put, the indorsement of a patent, the conveyance is defective. The defect in that case is not in the want of title in the grantor, but in the defective conveyance which he has used; and if we take the words of the act of 1891, "other colorable title," as an exposition of the words "or otherwise" in the act of 1715, and expound colorable title by what is meant by

giving color in pleading, the only case in which I find color of title used anterior to the acts before mentioned, color of title may then be defined to be a *writing* upon its face *professing* to pass title, but which does not do it, either from a want of title in the person making it or the defective mode of conveyance that is used; and it would seem under the act of 1791, at least, that it must not be plainly and obviously defective, so much so that no man of ordinary capacity could be misled by it. The color of title set up in this case not being in writing, for he proves the purchase by parol only, wants one of the essentials before mentioned, and is therefore insufficient. If the purchase appeared in the sheriff's return, it would then be necessary to examine whether such a return professed to pass the title. What is said as to what may be the effect of the words, *other colorable title,* used in the act of 1791, (122) upon the possessions which the act confirms, I beg to be considered as a mere *obiter dictum,* for that act cannot affect the construction of the act of 1715, which *alone* we are now considering.

TAYLOR, C. J., and HALL, J., concurred.

Cited: *Comrs. v. Duncan,* 46 N. C., 241; *Kron v. Hinson,* 53 N. C., 348; *McConnell v. McConnell,* 64 N. C., 344; *Keener v. Goodson,* 89 N. C., 277; *Ellington v. Ellington,* 103 N. C., 58; *Avent v. Arrington,* 105 N. C., 390; *Williams v. Scott,* 122 N. C., 550; *Barker v. R. R.,* 125 N. C., 601; *Greenleaf v. Bartlett,* 146 N. C., 498; *Bond v. Beverly,* 152 N. C., 61; *Barrett v. Brewer,* 153 N. C., 549; *Ipock v. Gaskins,* 161 N. C., 684; *Burns v. Stewart,* 162 N. C., 365; *Lumber Co. v. Pearce,* 166 N. C., 590; *Norwood v. Totten,* 166 N. C., 649; *Green v. Spencer,* 167 N. C., 431; *Graves v. Causey,* 170 N. C., 176; *Alsworth v. Cedar Works,* 172 N. C., 22.

HART v. NEWLAND.—From Stokes.

In case for deceit in the sale of a runaway negro, who was alleged to be unsound, the defense was that the plaintiff knew it before purchasing, and evidence was offered that plaintiff's wife had carried food to the negro, who was lurking about plaintiff's farm, before the purchase. *Held,* that such evidence was inadmissible.

CASE. The declaration was for a deceit in the sale of a negro. The defense set up was that the real situation of the negro, who was consumptive, was as well known to the plaintiff as to the defendant, and even better. The negro, a short time before the plaintiff purchased him, was a runaway, and to bring home the fact of planitiff's knowledge of his situation, defendant was permitted to prove that, while the negro was a runaway, he had been seen two or three times lurking about the plantations in the neighborhood of the plaintiff, at whose house the negro's wife was. The plaintiff knew that he was a runaway, repeatedly expressed a wish to purchase him, and applied to an individual to go and purchase him while he was a runaway. Another witness for the defendant said that he had seen the negro, while he was a runaway, twice at his (the witness's) house in the plaintiff's neighborhood. Defendant's counsel then asked witness whom he had seen bringing food to the (123) negro, and stated that he expected to prove that the person was plaintiff's wife. The court deemed the evidence inadmissible against the husband, unless it were shown, first, that the husband was at home at the time, or had seen the wife going, or in some way assented to it. There was a verdict for the plaintiff, and the case stood before this Court on a motion for a new trial because of the improper rejection of evidence.

HENDERSON, J. Evidence is of two kinds: that which, if true, directly proves the fact in issue, and that which proves another fact from which the fact in issue may be inferred. The rules regarding competency only apply to the first kind of competency, and relevancy to the second. The court protects the jury both from incompetent and irrelevant evidence. The farther removed the fact to be inferred is from the fact proven the less is the probability, for in each inference there *may* be an error; and the rules of evidence are framed more with a view to exclude falsehood than to let in the truth. They are said in this particular not to be unlike the rule of descent in excluding the half-blood, which is subsidiary to the grand canon that none shall succeed to the inheritance but one of the blood of the first purchaser. The subsidiary rule deprives *many who are* of the blood of the first purchaser of the inheritance; but by a rigid adherence to it none but one of the blood can succeed. That the fact to be inferred *often* accompanies the fact proven is not sufficient; it should *most usually* accompany it; and I would say, in the absence of all circumstances, that it should *rarely* otherwise happen. But the strong objection in this case is that there must be two inferences drawn to wit: the wife saw and fed the slave, *ergo* she knew (124) he was diseased; that the wife knew it, *ergo* the husband knew it, being informed by her. An error in either inference, which might very well happen, would introduce a falsehood; which, as I have before said, is an object of more solicitude than the exclusion of the truth. The judge, I think, was right in refusing the evidence. The rule for a new trial must be discharged.

HALL, J., *dissentiente:* I am inclined to think that proof of the wife's acts, in this respect, ought to have been received in evidence. When received, they are not at all decisive of the question; but the jury are at liberty to draw such inferences from them as they may think right and just. One reason given why the wife shall not be a witness for or against the huusband is that perjury might be committed in suffering a person to give evidence who labors under so great a bias. That reason does not hold good in this case.

It appears to me also to be relevant, for the defense made by the defendant was that the plaintiff was as well acquainted with the slave as the defendant was. If the plaintiff was proved to have seen and fed the negro when runaway, and just before he bought him, it would certainly be proper evidence to be left to the jury. If the wife was proved to have acted in the same way, although weaker evidence, it appears to me to be evidence of the same character. It is not conclusive, but a circumstance of which the jury ought properly to judge.

I therefore think the rule for a new trial should be made absolute.

PER CURIAM. No error.

Cited: S. v. Vinson, 63 N. C., 338; *Johnson v. R. R.,* 140 N. C., 584.

DEN ON DEM. TAYLOR v. FEN AND PARSLEY.

A. conveyed, by deed of trust, his real estate to trustees to satisfy creditors, and, continuing in possession, died. His widow is not entitled to dower therein.

EJECTMENT, tried before *Paxton, J.,* at WAKE. On the trial of this cause it appeared that on 18 November, 1820, Robert Parsley of Wake County was seized in fee simple in posession of the lot of ground and improvements in the declaration mentioned; and on that day he executed a deed to the lessor of the plaintiff in fee, in trust, to secure and pay certain debts therein mentioned, as due to third persons who were parties to the deed, which deed was duly proved and registered in the register's office of Wake County; and it further appeared that the said Robert Parsley continued in the possession of the said lot up to the time of his death, which happened on the......day of March, 1821; and that the defendant is his widow and relict, and that she, after his death, instituted proceedings in Wake County court for her *dower* in the said lot and premises at August court, 1821; whereof notice was given to the administrator of Robert Parsley, but no notice whatever to the lessor of the plaintiff, or to the heirs at law of the said Robert; and at August session aforesaid of said court it was ordered that a writ of dower issue; whereupon a writ of dower issued to the sheriff of Wake County who proceeded to impanel a jury, which assigned to her the premises in dispute as her dower, and made due return thereof to the November sessions, 1821, of the county court of Wake, when their report was by said court ordered to be confirmed; and, besides, it further appeared that the debts and money mentioned in the deed to the lessor of the plaintiff remain unpaid and are fully due.

Upon all which the defendant's attorney moved the court to (126) instruct the jury "that the defendant was entitled to dower in the said lot and premises, and that the same had been properly assigned to her, and, therefore, the plaintiff could not recover in this action the said premises mentioned in the said assignment of dower of which the defendant admitted herself in possession"; which instruction the court refused to give, and the jury thereupon rendered a verdict for the plaintiff, and the court gave judgment accordingly

The defendant thereupon moved for a new trial upon the ground of the court's refusal to give instructions as above required, which was refused, and the defendant appealed to this Court.

Gaston for appellant.
Ruffin contra.

HALL, J. Laws 1715, ch. 7, points out the mode by which conveyances for land shall be made, and declares that when so made they shall be good and available in law, without livery of seisin, attornment, or other ceremony in the law whatsoever. By sections (147) 2 and 3 provision is made for the registration of deeds made before that time, and also for deeds made in foreign parts, and such deeds are declared valid; sections 7 and 8 regulate the registration of mortgages, and take away the equity of redemption from a second mortgagor; section 9 declares that the wldow of a mortgagor shall not be barred of dower who did not legally join with her husband in such mortgage

I cannot perceive the object that this latter clause was intended to answer, because without it widows of mortgagors who had not joined with their husbands would have been entitled to dower as much as widows would have been who had not joined with their husbands in other conveyances pointed out by the act as valid for the purpose of passing lands. It seems, however, not to have a prospective operation; the expression is, "who *did* not join with her husband in such mortgage," it, therefore, can have no bearing upon the present question. At that time, and since, up to 1784, widows were entitled to dower in lands of which their husbands were seized at any time during the coverture. The act passed in that year (New Rev., ch. 204) makes a great alteration in the rights of dower. That act declares (sec 8) that widows shall be entitled to one-third part of all the lands, tenements and hereditaments of which her husband died seized or possessed. It seems to be somewhat difficult to understand what, *ex vi termini*, the Legislature intended by the word possessed; because it (148) is difficult to imagine a case when a widow would be endowed of a possession only. If it be considered as synonymous with *seized,* and tautologically inserted, there is no difficulty.

It has been argued that it comprehends the case of possessions of mortgagors who die before foreclosure, as in the present case. I cannot adopt that construction of the act, because I think the act of 1715, relative to mortgages, not to be in force, and because I cannot think that the widow of a mortgagor who has parted with his title to the land is in a better situation than the widow of a person who made a clear conveyance of his land. In either case the grantor does not die seized of the land, and I conceive the Legislature never intended to give dower of a possession of land when the seizin was adversely in another person. Here it is so, and it is placed so by the husband's intent, to answer another purpose after his death, inconsistent with dower.

It is true, in the act of 1715, ch. 4, sec. 6, the Legislature consider a widow entitled to dower of lands which her husband had entered in his lifetime, but for which he had taken out no grant; but in that case it will be seen that there is no adverse seizin, and that case is one *sui generis.*

There is some color for the belief that in the act of 1715, ch. 2, the Legislature used the word possession as synonymous with the word seizin, when they speak of a seven years possession under a defective or colorable title as giving a right; and such continued possessions ripening into title, although called possessions, are in fact the titles to the land; but naked possession, even held under a trust, will not give dower. By the act of 1791, also passed for quieting ancient titles and limiting the claim of the State, it is declared that twenty-one years possession under colorable title should be a bar against (149) the State, but that possession is the title to the land, and is used as amounting to the same thing as if they had said, seized of the land. In my opinion, there is no ground whatever for saying that the defendant in the case before us is in law entitled to dower.

TAYLOR, C. J., and HENDERSON, J., concurred.

DOE ON DEM. OF HAWKINS v. SNEED & SNEED.—From Granville.

A., being much indebted, absconded: executions issued against his property at the instance of several creditors. Prior to the sale of the property, C., who was a creditor by bond, received from A. the sum of $300, to be applied in satisfaction of the claim of a judgment creditor, P., whose judgment was $357. C. failed to make the application as directed, but permitted the property levied on to be sold by the sheriff, and became himself the purchaser at the price of $800, and paid off the judgment of P. only, and afterwards conveyed to the lessors of the plaintiff. Between the time of C.'s purchase and the conveyance to plaintiff's lessors the property was sold under the executions of some of the other creditors, and defendants purchased. In an ejectment between the last purchasers and C.'s vendees, it was held that C.'s conduct was not fraudulent as to the creditors of A., and though, in equity, A. had a claim against C., and a reconveyance to A.'s creditors might, perhaps, be decreed, yet A.'s equitable lien was not such as was contemplated by the act of 1812, rendering lands held in trust liable to an execution against *cestui que trust;* and at all events, whatever might have been the conduct of C., the purchasers from him were *bona fide* purchasers, without knowledge of or participation in his breach of trust, and, therefore, should be protected.

EJECTMENT for house and lot, tried before *Donnell, J.* On the trial the defendants admitted themselves in possession of the premises mentioned in the declaration, and both parties claimed under William H. Clay, who, it was admitted, once had title to the premises. (150) The plaintiff deduced his title in the following manner: Absalom Yancey recovered a judgment in Granville County court, November session, 1819, against Clay for $785, with interest thereon from 4 April, 1819, till paid, and costs; on which a payment of $470 was made on 13 April, 1819, and on which the sum due in July, 1820, was $346.19, whereon a *fi. fa.* issued from February sessions, 1820, of said county court, and was returned to May sessions, 1820, levied on the premises in dispute. Samuel Parkhill and John Parkhill also, on 25 November, 1819, sued out an attachment against the estate of said Clay as an absconding debtor, returnable to Granville County court, February session, 1820, which was also levied on the premises in dispute, and due return thereof made to the county court, where, at May Session, 1820, the said S. and J. Parkhill recovered the sum of $327.95, with interest on $263.41, from 1 May, 1820, until paid, and costs, on which the amount due in July, 1820, was $357.90½. The plaintiff gave in evidence the records of the said judgments, and also that writs of *venditioni exponas* issued on each, from May sessions, 1820, of said court, and were delivered to the sheriff of Granville, who by virtue thereof sold the premises in dispute on 29 July, 1820, and Thomas Cooke became the purchaser, he being the highest bidder, at $800, but satisfied Parkhill's execution only; and afterwards, viz., on 29 March, 1821, the sheriff made a deed to said Cooke therefor which has been duly proved and registered; and the plaintiff further deduced title to the premises in dispute by a deed of trust in fee, made by the said Cooke to the lessor of the plaintiff on 27 February, 1821, to secure the indorsers of the said Cooke in the banks to the amount of $3,000 or $4000, which deed included also all the other property of Cooke. No evidence was offered of any money having been paid by the lessor of the plaintiff to said Cooke, or of the debts mentioned in said deed as due to the banks, except the recital in (151) the said deed. The plaintiff also read in evidence to the jury a bond from William H. Clay to said Cooke, witnessed by John Green and dated 25 May, 1820, for $551.66, payable one day after date.

The defendants claimed title as follows: The said William H. Clay was indebted to Willie P. Mangum on 20 May, 1820, in the sum of $28, for which a warrant was brought before a justice of the peace in Granville County, who rendered judgment thereon, from which an appeal was taken to the next county court of Granville, to wit, August sessions, 1820, in which case, at the suceeding November sessions, 1820, judgment was given in favor of the said Mangum for his said debt and costs, and thereupon a *fi. fa.* issued, which was levied on the disputed premises by the sheriff on 4 December, 1820, and return thereof was made to February sessions, 1821, of said court, and thereupon a *venditioni exponas* issued to May sessions, 1821, upon which the sheriff, on 29 March, 1821, sold the premises in legal form, and conveyed them by deed to the defendant, who, upon the trial, read in evidence the record of Mangum's recovery, the writs of execution issued thereon, and the sheriff's deed to them, which had been duly proved and registered.

The defendants further alleged that the purchase made by the said Cooke, and the deed by him taken, were fraudulent and void as against the said Mangum and other creditors of Clay; and to prove this they gave in evidence that Clay had resided for several years in Granville County, and that in 1819 he was greatly indebted and removed to Georgia, and soon afterwards became insolvent; that in the spring or early in the summer of 1820 he sent by one John Green the sum of $646.19 to the said Cooke, to be applied to the satisfaction of said debts owing to S. and J. Parkhill; that the sheriff agreed to take the promise of said Green to pay the debt of Yancey, and (152) that on 29 July, 1820, the said Green did pay to the sheriff the sum of $346.19 in satisfaction of Yancey's execution, and that also on 29 July, 1820, the said Green paid over to said Cooke the sum of $300, and took his receipt therefor, in the following words, viz.:

29 July, 1820.

Received of William H. Clay, by the hands of John Green, $300 for the purpose of applying to the credit of an attachment which J. and S. Parkhill had against said Clay.

THOMAS COOKE.

That the said Cooke did not thereupon pay the said money over to the sheriff, but suffered the disputed premises to be sold, and bought them himself, as aforesaid.

On behalf of the plaintiff it was then contended that although Cooke had not credited the bond of Clay, which he held, with the said $300, yet he had a right to apply the said money to his own debt, and then to purchase the premises at the sheriff's sale without imputation of fraud; and the plaintiff's counsel further contended that although the said Cooke had not applied the said sum to the satisfaction of the said executions, yet his purchase of the premises did not thereby become fraudulent and void, but it only constituted a breach of trust, for remedy whereof the said Clay or his creditors must apply to a court of equity, since the legal title passed to Cooke by the sale of the sheriff, and his deed is good and valid; and they also further contended that even if the purchase made by Cooke was fraudulent and void, while he himself should claim under it, yet that the lessor of the plaintiff was a *bona fide* purchaser for a valuable consideration without notice, and that by reason thereof his title was good. And, on behalf of the plaintiff the court was moved to instruct the jury accordingly. But the court refused so to instruct the jury, and (153) charged the jury "that if they should believe that Cooke purchased the said house and lot with said Clay's money, and in trust for him, and took the deed to himself with intent to defraud or hinder the said Mangum or other creditors of said Clay of their debts, the same was void; and the premises still would remain subject to the creditor's of Clay." And the court further charged the jury; if they should be of opinion that the said purchase and conveyance to Cooke was fraudulent and void as aforesaid in the hands of said Cooke himself, that the same still continued fraudulent and void, and could not be set up against the said Mangum and the defendants by the lessor of the plaintiff, notwithstanding the said deed from the said Cooke to the lessor of the plaintiff under the circumstances aforesaid. The jury found for the defendant, and judgment was given accordingly. On motion for a new trial the same was overruled, and the plaintiff appealed to this Court.

Gaston and Hillman for appellant.
Ruffin for appellee.

TAYLOR, C. J. The conduct of Cooke after receiving Clay's money under a promise of applying it in payment of Parkhill's judgment, though not reconcilable with strict morality, is yet susceptible of some extenuation. The sum was insufficient to pay the debt, and would not, therefore, have arrested the execution. Cooke was himself a creditor, and must have passively witnessed a sale of the property and the probable loss of his own debt; hence the temptation was strong upon him to seize a plank in the shipwreck; and though in justice such temptation should have been resisted after his promise, even at the hazard of losing his debt, yet his conduct cannot in any point of view be considered as fraudlent upon Clay's creditors. All that they or Clay can rightfully demand from him is the surplus of the money for which the property sold. To a certain extent Cooke became a trustee for Clay, but to what amount depended upon the adjustment of accounts between them. (154) But the act of 1812 rendering lands liable to execution against the *cestui que trust* does not affect this case; for that act relates only to those fraudulent trusts in which the trustee has nothing more than the formal legal title, and the *cestui que trust* the whole beneficial interest; for the act provides that on such sales the land shall be held and enjoyed, "freed and discharged from all encumbrances of such person or persons so seized or possessed, in trust for the person or persons against whom such execution shall be sued." It is very evident that executions were not intended by the statute to reach those equitable interests which depend on the consideration and adjustment of various points of equity and the settlement of accounts.

I am o opinion that Clay's interest in this lot, or rather his equitable claim upon Cooke, was not one of those contemplated by the act.

But whatever the conduct of Cooke was in the purchase of the lot, it cannot affect the title of Hawkins. He was a fair purchaser without knowledge of or participation in the breach of trust committed by Cooke, and is entitled to recover. There must be a new trial.

HALL, J. I am at a loss to see how the statute of frauds has any bearing upon this case; certainly not by the purchase of the property at the day of sale. Every person was invited to purchase, and Cooke gave more than anybody else was willing to give. With respect to the amount of Clay's money in his hands, it could have been on the trial reduced to a certainty there was not as much as the execution calls for under which the property was sold. Whether if it had been paid to the plaintiff in the execution it would have stopped the sale is not known. I admit Clay had an equity against Cooke. Perhaps Cooke might have been compelled to reconvey the property sold to Clay, or perhaps to Clay's creditors, but not without paying the debt (155) which Clay owed him by bond. If he was in this respect a trustee for Clay, it was such a trust as could not be sold under execution.

I think there ought to be a new trial.

HENDERSON, J., concurred.

PER CURIAM. New trial.

DOE ON DEMISE OF EU-CHE-LAH v. WELSH.—From Buncombe.

Cherokee Indians in possession of lands within the limits of North Carolina, reserved under the treaties of 1817 and 1819, made by the United States and the Cherokee Nation, are to be considered as purchasers of the land. The exercise of power by the commissioners of the United States is legitimate; and, moreover, the stipulation in these treaties, having been recognized by several acts of the Legislature of North Carolina, passed since, she must be considered as assenting to them. A grant of the land to the Indian in possession is not necessary, for it is not claimed under those laws which point out the manner of acquiring title to vacant lands in this State, and title may be complete in some cases without grant; *e. g.*, the University holds escheated lands under an act of Assembly.

EJECTMENT. The plaintiff's lessor, a Cherokee Indian, claimed title to the land in dispute, under treaties between the United States of America and the Cherokee Nation, made in 1817 and 1819.*

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*The treaty of 8 July, 1817, after reciting that a deputation from the upper and lower Cherokee towns went to the city of Washington the first, to declare to the President their wish to engage in the pursuits of civilized life, and the impracticability of inducing the nation at large to do this, and, therefore, to request the establishment of a division line between the upper and lower towns; and the deputies from the lower towns to make known their wish to continue the hunters' life, the scarcity of game where they then lived, and their desire to remove to the westward of the Mississippi on vacant United States lands; and that the President of the United States permitted those who wished to remove to send an exploring party to reconnoiter the country on the Arkansas and White rivers, which exploring party, having selected a portion of country, the Cherokee Indians were desirous of ratifying the transaction by treaty, and for that purpose had sent on agents duly authorized, proceeds by the first and second articles to cede to the United States lands east of the Mississippi in exchange for lands on the western side of the river. The second article provides that a census of the Indians shall be taken; and the eighth article contains a reservation in the following words: "And to each and every head of any Indian family residing

The plaintiff's lessor, to bring himself within the provisions of the treaties, gave in evidence the following documents: (156)

1. A commission from James Monroe, President of the United States, to Col. Robert Houston, dated 12 March, 1819, constituting him an agent on the part of the United States to run the boundary lines of the lands ceded by the Cherokees, and to run off and (157) locate the Indian reservations in Tennessee.

2. A certificate from Colonel Meigs, Indian agent, that the lessor of the plaintiff had enrolled himself according to the provisions of the treaties.

3. A certificate and survey made by Colonel Houston and Robert Armstrong, surveyor, of 640 acres, the land now in dispute, for and and on his account, dated 27 September, 1820.

4. A letter from the Secretary of War of the United States to Colonel Houston, inclosing the commission, and containing the following clause: "In addition to the duty required of you by the commission, you are requested to lay off also the tracts reserved in North Carolina and the Alabama Territory."

Defendant was proved to be in possession of the land described in the declaration, claiming under a purchase from North Carolina, and

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on the east side of the Mississippi River, on the lands that are now or may hereafter be surrendered to the United States, who may wish to become citizens of the United States, the United States do agree to give a reservation of 640 acres of land in a square, to include their improvements, which are to be as near the center thereof as practicable, in which they will have a life estate with a reversion in fee simple to their children, reserving to the widow her dower, the register of whose names is to be filed in the office of the Cherokee agent, which shall be kept open until the census is taken as stipulated in the third article of this treaty."

The treaty of 27 February, 1819, recites that whereas a greater part of the Cherokee Nation have expressed an earnest desire to remain on this side of the Mississippi, and, being desirous, in order to commence those measures which they deem necessary to the civilization and preservation of their nation, that the treaty between them and the United States, signed 8 July, 1817, might without further delay, or the trouble or expense of taking the census, as stipulated in the said treaty, be finally adjusted, have offered to cede to the United States a tract of country at least as extensive as that which they probably are entitled to under its provisions; the contracting parties have agreed to and concluded the following articles:

The first article cedes a portion of country (within which are the lands in dispute); and the second article is in these words: "The United States agree to pay, according to the stipulations contained in the treaty of 8 July, 1817, for all improvements on lands lying within the country ceded by the Cherokees which add real value to the land; and do agree to allow a reservation of of 640 acres to each head of any Indian family residing within the ceded territory, those enrolled for the Arkansas excepted, who choose to become citizens of the United States in the manner stipulated in said treaty."

it was also found that the lessor of the plaintiff at the ratification of the treaty of 1819 was not living on the lands contained within the lines of his survey, nor within a mile and a half or two miles of it; but he had on it a field cleared and fenced, a crib within the enclosure where he housed his corn, and a hut.

Nash, J., who presided, directed the jury that if they were satisfied that the facts stated in the documentary evidence before them were true, that the plaintiff was seized of such a title as would enable him to support an action of ejectment; that it was not essential to the validity of his title that the land should have been laid off to him by the officer of the United States in an exact square; nor was it necessary for him to show that at the ratification of the treaty of 1819 he was living upon the land. If he had an *improvement* upon it it was sufficient, though he was living at another place.

The jury found a verdict for the plaintiff, and a motion for (158) a new trial on the part of the defendant having been refused, from the judgment rendered he appealed.

Wilson for the lessor of the plaintiff.
Gaston and Ruffin contra.

TAYLOR, C. J. Although this controversy is, in reality, between the plaintiff, a Cherokee Indian, on the one side, and the State of North Carolina on the other, who should certainly renounce all claim to the purchase money in the event of the defendant's being evicted; yet it is very gratifying to remark that throughout the whole progress of the business the faith of the State remains unpledged, her honor inviolate; for not the slightest inference can be drawn from any of the acts passed on the subject that she intended to sell the Indian reservations, or to confer that power upon the commissioners. The two acts confine the sale expressly to the lands acquired by treaty from the Cherokees, and are silent as to the lands reserved to the Indians. These, on the contrary, are recognized; the general reservations are protected from the purchase, lease, and cultivation of white men, under a heavy penalty; and the special ones to the two Indians called Major Walker and the Big Bear explicitly acknowledged to belong to them absolutely. 1819, ch. 997; 1820, ch. 1060; 1821, ch. 32; 1822, ch. 12; 1823, ch. 11; 1820, ch. 1062.

If the General Government had a constitutional right to make these two reservations, they had an equal right to make the whole, for the same principles apply to all. It will follow that as the commissioners were constituted for a particular purpose, and with a limited and circumscribed authority to sell the lands which were acquired by treaty, their selling the lands which were reserved was an excess of authority, neither in law nor reason obligatory upon the State, their principal. But as these observations relate solely to the defendant's title, the weakness of which, however obvious, will not enable the plaintiff to recover without showing a possessory right in himself, it becomes necessary to examine the several foundations on which that right has been (159) rested and the arugments by which it has been opposed. As to the nature of the Indian title in general, it will be necessary to make a few remarks for the sake of tracing some peculiar features which have been impressed upon it at different periods by the Legislature of this State in its intercourse with some of the tribes living within its limits.

It was a principle uniformly asserted by Great Britain that the ultimate dominion of newly discovered countries not known to Christian people belonged to the discoverer; and all the colonial charters, from the first granted to Cabot by Henry VII. down to the last, of Georgia, by George II., were made while the country was yet occupied by Indians. Most of these contain a grant of the soil as well as the powers of government, and they all proceed on the principle that the crown alone had a right to grant the soil; that the Indians had ceased to have any other than the temporary right of occupancy, and that a good title might be acquired by individuals under these grants, subject to the Indian right, and to be enjoyed when that right should be extinguished. 8 Wheat., 543. While the title remained in the crown no one was permitted to purchase from the Indians, nor was any title acquired from them deemed valid without the confirmation of the crown. The Indians were allowed to occupy and hunt on the lands, and to be governed by their own laws, but could not sell or lease without the consent of the government. When they retreated farther west, which sometimes happened from the scarcity of game or the constantly advancing settlement of the whites their lands reverted to the crown in full dominion, or became vested in possession in those individuals to whom they had been previously granted. This Indian right, consisting of the *usufruct* more than the ownership of the soil, was rather tacitly submitted to than expressly acknowledged, for in the charters it is not noticed. The lands are granted by boundaries, including many tribes, and in the charter to the lords proprietors in this State, though the boundaries extend to the South (160) Sea, comprehending many nations, they or their rights are not noticed.

In the treaty of Utrecht (9th State Papers) the five nations were described as subjects of Great Britain; and in a proclamation issued in 1763 all purchases of lands made from the Indians were declared void unless made by treaties held under the sanction of government. In the treaty of 1763, by which Great Britain acquired from France the sovereignty of the Canadas, many nations of Indians were included in the boundaries. As most of the powerful and maritime nations of Europe were animated with a spirit of discovery and settlement of new countries, it became essential to their peace to adopt some principle by which their rights should be reciprocally acknowledged. The exclusive dominion over the soil of the Indians after their temporary occupancy should cease, and the right of purchasing from them such ownership as they were acknowledged to have, was accordingly claimed by each and acquiesced in by all, and may thenceforth be considered as incorporated in the law of nations.

Writers on the law of nature have maintained the justice of this principle in furthering the designs of Providence, and tending to the increase and civilization of the human race. Montesquieu L., 10; Vattel. They argue that every nation is under a natural obligation to cultivate the land that has fallen to its share, since otherwise the whole earth, which is destined to feed its inhabitants, would not yield an adequate supply if large tracts of fertile land were peopled only by hunters and shepherds; that however right this might have been in the first ages of the world, when the spontaneous productions of the earth were more than sufficient for its few inhabitants, it cannot now be justifiable, when the great multiplication of the human race in some countries has rendered it essential to their subsistence that the forests should be cleared and cultivated. (161) The unsettled habitation of savages in those extensive tracts of country over which they wander, but cannot cultivate, must be inconsistent with the views of nature, while other nations are confined within a small compass, which no degree of skill or labor will render sufficiently productive. The only obligation which justice imposes on other nations is that they leave the natives a sufficiency of land.

It is not intended to inquire into the force of this reasoning, but only to show the nature of the claim to Indian lands set up by Great Britain, and the condition in which it was transferred to the lords proprietors. Perhaps if such weighty reasoning could not be given, dominion would be claimed on the credit of the superiority which European nations possess over the nations of the new world; for to that must be referred the conquest of the civilized nations of Peru and Mexico. On this principle Cæsar acted when, forgetting the passions as well as the rights of mankind, he complained that the Britons, after having sent him a submissive message to Gaul, pretended to fight for their liberties, and to oppose his descent on their island.*

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*Cæsar questus, quum ultro, iu continentem legatis missis, pacem a se petissent, bellum sine causa intulissent. Lib. 4 *de Bello Gallico*.

However extensive the right was which passed by the charter of the lords proprietors, it appears that at a very early period after the settlement of the State, 1717, reservations of land were made to the Indians by treaty; and to the Tuscaroras, the only powerful nation with whom the whites then had intercourse, a grant was made of lands in consideration of their agreeing to relinquish their claims to other lands which had before been allotted to them. Afterwards an individual obtained a grant for the same lands, and an act of the Legislature subsequently passed, 1726, confirming all grants for lands within the Indian boundary, and permitting the grantees to enter upon the Indians deserting the same. Yet it was held that a title set up under this grant could not prevail against the original grant to the Indians, although they had (162) ceased to live upon the land, since the grant contained no condition of residence, and was made by persons having power to convey to persons capable of taking and holding lands. *Sacarusa v. King,* 4 N. C., 336. The Legislature has, indeed, since that time, 1778, passed acts declaring that lands granted to the Indians shall revert to the State upon the natives becoming extinct or entirely abandoning the possession; but there is no instance of their having revoked a grant made to them. On the contrary, the prevalent policy before the Revolution was to consider them as persons capable of being treated with and of holding property as a tribe or nation. Their rights of property, though much circumscribed by the repeated cessions they have made by treaty, were respected as to what remained, and much solicitude is shown in repeated enactments to restrain the cupidity of the whites.

In pursuance to this policy the people of this State, when they threw off their colonial dependence and declared the soil to be the property of the community, were not unmindful of Indian rights: "*Provided always,* that this declaration of right shall not prejudge any nation or nations of Indians from enjoying such hunting grounds as may have been or hereafter shall be secured to them by any former or future Legislature of this State." Section 25.

Since the treaty of peace, by which the territorial limits of the State were acknowledged in as full sovereignty as they formerly belonged to the mother country, it has been the invariable object of the United States and of this State to regulate their intercourse with the Indians, not by any speculative notions of right which they might have exercised without violating any admitted principle, but by the dictates of a just, humane, and liberal policy. As to the United States, it is sufficient to refer to the treaty of Greenville, 1795, by which "The Indian tribes are quitely to enjoy their lands; hunting, planting, and (163) dwelling thereon as long as they please without molestation from the United States; but that when their tribes or any of them are disposed to sell their lands, they are to be sold only to the United States; that until such sale the United States will protect all the said Indian nations in the quiet enjoyment of their lands against all the citizens of the United States, and against all other white persons who intrude on the same, and that the said Indian tribes again acknowledge themselves to be under the protection of the United States, and of no other power whatever."

Of the policy of this State, Laws 1783, ch. 185, under which the plaintiff claims title, affords a conclusive example. By this act it is declared that the Cherokee Indians shall have and enjoy all the tract of land therein described, and that it is reserved to them and their nation forever. The effect of this grant was to vest the land in the nation in fee simple; it conveyed to them a specific and definite right, according to which they could no longer be considered as tenants at *sufferance,* but as holding under the faith of the State and the guarantee of the declaration of rights. It is true that no individual had a distinct portion allotted to him which he might protect from aggression, and on that account the Legislature has made it penal to trespass on the land; but the right of the Legislature to make the grant cannot be doubted; and it is not less clear that it must inure to the benefit of the tribe as long as they subsist upon it and their title is not surrendered by their own consent.

If this grant required confirmation, it has received it in the most ample manner by the treaty of Hopewell, 1785, made under the authority of the United States, and by the treaty of Holstein, 1791, by which the lands not ceded by the Cherokee nation are solemnly guaranteed to them.

(164) In this state of things the two treaties were made under which the plaintiff claims the land described in the declaration as having been set off and allotted to him, and located according to the terms of the treaties, 1817 and 1819.

The 8th article of the first treaty provides that a reservation of 640 acres of land shall be given to every head of an Indian family residing on the east side of the Mississippi River, the register of whose names is to be filed in the office of the Cherokee agent. The land is to be laid off in a square, including their improvements, which are to be as near the center thereof as practicable, in which they will have a life estate, with a reversion in fee to their children, reserving to their widow her dower. By the second article of the latter treaty it is provided that a reservation of 640 acres of land shall be allowed to each head of any Indian family residing within the ceded territory who chooses to become a citizen of the United States in the manner stipulated in said treaty.

The only manner stipulated in the treaty of 1817 is that the Indians who wish to become citizens shall register their names in the office of the

Cherokee agent. This has been done by plaintiff, as appears from the certificate of the Indian agent, and the 640 acres of land have been surveyed and laid off for him.

The following objections have been made to the plaintiff's recovery:

1. That the commissioners who made the treaty had no authority to make reservations to the Indians, but only to extinguish their title; when that is done the land reverts to the State by force of its ancient seisin, and that the Government of the United States is restrained by the Constitution from granting the territory of or dismembering a State.

2. That, supposing the commissioners had this power, they have not executed it, but only agreed to do so; the contract was intercepted by the paramount right of the State.

3. That the land is not laid off in a square of 640 acres, to (165) include the improvements, which are to be as near the center of it as possible.

4. That Armstrong made the surveys without proper authority.

5. That his plat was not returned to the General Government.

1. The first objection is founded on the assumption that the treaty has first extinguished the title of the Indians to the whole lands granted them by the act of 1783, and then assigned part of it to the plaintiff; but a just construction of the treaty will not, in my apprehension, warrant this conclusion. It extinguishes all the Indian title except to those lands which were reserved. The very term "reservation" imports in common acceptation something kept back or not surrendered. The plaintiff does not derive his title from the treaty, but from the act of 1783, which gave the whole land to him in common with the rest of the nation. His claim in severalty is alone derived from the treaty and the location made according to it. As well might it be said that if a grant were made to three persons as tenants in common of 100 acres of land, and they agree to sell the land to a fourth person, reserving 10 acres to one of them, to be laid off by metes and bounds, that he held the land under the surrender and not under the original grant.

As the United States have alone the power of making treaties, their acts within the limits of their authority must be obligatory on the State, their constituent. They might unquestionably have extinguished the Indian title to the whole tract, in which case the right to the whole would have reverted to the State. Why, then, may they not extinguish the title to a part? The stipulations of the treaty are equally binding on both parties; and it was not to have been expected that an acquisition so valuable could have been made to the State without some equivalent. The reservations are more entitled to respect since (166) they further the policy of the State in leading the few Indians that remain to an agricultural and civilized life.

Acccording to this view of the case, any opinion on the power of the United States to grant away any part of the territory of the State would be extrajudicial. That question would arise if the grants had been made out of other lands, the title to which did not previously subsist in the Indians, or if the cession had been made by one treaty and the reservation by a subsequent one.

2. The words of the treaty are: "do agree to allow a reservation of 640 acres of land to each head of a family formerly residing within the ceded territory." 1819, Art. 2. The words *"do hereby allow or reserve"* would have been more technical; but treaties and legislative acts are to be construed in good faith according to the intention of the parties making them. The reservations were allowed by the treaty in words of sufficient import, not of any particular 640 acres to any individual, for that depended upon the future acts of enrollment and the location. By these acts the general reservations became particular ones, according to the case of *Rutherford v. Green,* 2 Wheat., 197. By the act of 1782 it was provided "that 25,000 acres shall be allotted to General Green, his heirs and assigns, within the bounds of the lands reserved for the use of the army, to be laid off by commissioners." It was contended against the general's title that the words gave nothing; that they indicate an intention to give in future, but create no present obligation on the State nor present interest in General Green. But it was held by the Court that it was a present donation, not of any specific land, but of 25,000 acres within the territory set apart for the officers and soldiers, and that when the survey and allotment had marked out the land it became a particular gift of the land contained in the security. The words (167) of the treaty are quite as strong as if they were in the present tense, and were evidently intended to be used in the same sense.

3. If the plaintiff claims title under the treaty of 1819, Art. 2, this objection fails in its application, for that provides simply for an allowance of 640 acres of land to those who become citizens according to the 5th article of the treaty of 1817. It makes no sort of provision for the manner in which the land shall be located, but confines that to special reservations for those Indians whose names are inscribed on the list annexed to the treaty. But if the claim is founded on the first treaty, it does not furnish an objection to the title. The survey was to be made by the State through its agent, the United States. If laid off in a different shape from that specified in the treaty, the Indian might have excepted to it, but it is not competent for the State to do so after the Indian has accepted of it. It was not to be expected that the Indians could control and direct the manner in which the lands were run, and it would be a most unjust act to deprive them of the land because the surveyor, the officer of the Government, had departed from the shape

specified in the treaty. It has been often decided that purchasers from the State shall not be injured by the mistakes of those who are appointed by the State to lay off and survey the land entered.

4. The first treaty provides that the land ceded by the Indians by the first and second articles shall be run by a commissioner or commissioners appointed by the President of the United States, 1817, Art. 11, and the land ceded by the first article of the treaty, 1819, Art. 5, are to be run by a commissioner appointed by the President; but the treaties are silent as to the persons by whom the lines of reservation are to be run. If, therefore, they are run under the authority of the United States, I think the treaty may be substantially executed without a commission from the President. It is true that his commission to Mr. Houston authorizes him to lay off the reservations in Tennessee (168) as well as to run the line of the cession. The act of running the lines, then, of the reservations, if not otherwise provided for by the treaty or by law, seems to me to come within the power of the duty of the Secretary of War as prescribed by law. 2 U. S. L., 32. It is a reasonable presumption that he was entrusted with this duty by the President, more especially as the Secretary of War was the person by whom the treaty of 1819 was made, and he must have been apprised of the necessity of laying off the reservations. To require proof of the President's authority to the Secretary for every act done in the course of his multifarious duties would be a strictness not to be foreseen or calculated upon in the ordinary transaction of business.

5. A general title to the land vested by the treaty in those who should comply with the condition of becoming citizens in the manner prescribed. This became a special and definite title to 640 acres as soon as the survey was completed and returned. The surveyor's plat of the land claimed has been exhibited in the present case, and by that the plaintiff has been enabled to ascertain and identify the tract allotted to him.

The validity of his title cannot be affected by the neglect of the surveyor to return a copy of the plat to the General Government.

Upon the whole case, my opinion is that the reservation was rightfully and constitutionally made, and that the plaintiff has proved a good title to the land described in the declaration, and, moreover, that the State commissioners exceeded the limits of their authority in selling the said land to the defendant.

HALL, J. It is admitted that the lands in question lie within the limits of North Carolina, and also within the boundaries of those lands which were set apart for the nation of Cherokee Indians by that State before the cession of Tennessee to the United States. It is also ad-

(169) mitted that the Cherokee nation lived upon those lands, and other adjoining lands, both while this State was a colony and after that time.

In the examination of this case it would be useless to inquire with what justice it was that the King of England seized upon these lands and declared himself sovereign thereof, without regarding the rights of the inhabitants whom he found in possession of them; because those rights formed no item in the title now relied upon, either for the plaintiff or defendant. This subject will be found to be ably and satisfactorily discussed and elucidated by the Chief Justice of the United States in *Johnson v. McIntosh,* 8 Wheat., 543.

While this State was a colony the British monarch not only claimed and exercised acts of sovereignty over it, but he, or those to whom he granted it, claimed a right to the soil itself.

By the Declaration of Independence, which gave to North Carolina as well as the other States their freedom and independence, all right to sovereignty and soil was transferred from the British Crown to the State of North Carolina, and the first step consequent thereon was the adoption by her of her present Constitution.

In section 26 of the Bill of Rights it is declared "that this declaration of rights shall not prejudge any nation of Indians from enjoying such hunting ground as may have been or hereafter shall be secured to them by any former or future Legislature of this State." After that time, in 1778, N. Rev., 137, the Legislature passed a law prohibiting all persons from hunting on their grounds; and also in 1783 they passed another law by which they reserved to them and their nation forever their lands by metes and bounds, forbidding purchase to be made from them and denouncing penalties against all persons who should make entries on their lands. The Constitution and these laws were (170) guarantees of the nation's rights by the State of North Carolina.

By the Articles of Confederation, of which the State of North Carolina became a member, it is declared in Article 9, "that the United States in Congress assembled shall have the sole and exclusive right and power of regulating the trade and managing all affairs with the Indians, not members of any of the States; provided that the legislative right of any State, within its own limits, be not infringed or violated."

In 1785 commissioners were appointed by Congress, who made the treaty of Hopewell. By this treaty the Cherokees are declared to be under the protection of the United States, and the boundaries of their grounds are agreed upon.

By section 8 of Article I Constitution of the United States, Congress are empowered to regulate commerce with foreign nations and among the several States, and with the Indian tribes. In the year 1791 another treaty was made with them, under the authority of the United States, by William Blount. By this treaty they are also declared to be under the protection of the United States, and new boundaries are marked out and agreed upon for their lands. Citizens of the United States are forbidden to hunt upon their lands, and all their lands not then ceded were solemnly guaranteed to them.

The next treaty was made in 1817 by Andrew Jackson, Joseph McMinn, and D. Meriwether, commissioners on behalf of the United States. By this treaty 640 acres of land was given to every head of an Indian family who wished to become a citizen of the United States, out of the ceded lands, to be laid off in a square, including their improvements, which improvements were to be as near the center as possible, in which they were to have a life estate, with a reversion to their children.

Another treaty was made by the Secretary of War on behalf of the United States in 1819. In this treaty the same reservation of lands is agreed upon to each head of an Indian family residing within the ceded territory who choose to become citizens of the United States (171) in the manner stipulated in the former treaty of 1817. In the same year, but afterwards, the Legislature passed another law prescribing the mode of surveying and selling the lands lately *acquired by treaty* from the Cherokee Indians. No clause in this act relates to the land reserved for Indians who might become citizens of the United States under the two last treaties. By this law the Legislature seems to sanction and adopt the provisions and stipulations of the treaties of 1817 and 1819; they accept of the land ceded by those treaties; they speak of them as acquired by the treaties, and proceed to direct the mode in which they shall be disposed of; and there is no dissatisfaction expressed, nor is there any reason to believe that any was felt at the stipulation in the treaty by which a portion of the lands were reserved for certain Indians; and when it is remembered that the United States gave to the Indians, out of lands belonging to the United States, an equivalent for the lands ceded by them, perhaps it will not appear that there was much room for dissatisfaction.

By an act passed in 1820 any person is forbidden to buy or cultivate any of the lands reserved to the Cherokee Indians by the treaties of 1817 and 1819. This expression of the public will is strongly corroborative of the plaintiff's right under those treaties.

The Legislature by another act, passed in 1821, gave authority to any white man who shall have purchased from this State at the sales made by commissioners under the act of the General Assembly lands reserved for the Cherokee Indians, to purchase or extinguish the right of the Indians to whom said lands were reserved. By this act the right of the Indians under the treaties is unquestionably acknowledged.

In 1822 another act was passed which provides for the sale of (172) lands lately acquired by treaty from the Cherokee Indians, which have been surveyed and remain unsold.

In the following year the Legislature passed another law respecting the reservations of certain Indians in the lands lately acquired by treaty from the Cherokee nation. By this act commissioners were appointed to contract with them for lands which the commissioners may believe they have a right to under the treaty; and by the 5th and last section in that act it is declared that when the commissioners appointed by this act shall adjudge that a title claimed by an Indian to a reservation under the above mentioned treaty is not a good and valid title where the land so claimed has been sold under the authority of the State, and the purchaser has been sued for the same, it shall be the duty of the Governor to employ able counsel to appear on behalf of such purchaser. This act, as well as those preceding it, recognizes the title of the Indians to the lands reserved for them under the treaties. But the Legislature, by the last clause, guarded against pretended Indian claims that might be attempted to be made under the treaty, not sanctioned by it. But if the claim now set up by the plaintiff is one of that sort, it has not been made to appear so to this Court.

It appears that the lessor of the plaintiff has elected to become a citizen of the United States by enrolling himself under Colonel Meigs, Indian agent, according to the provisions of the treaty.

It appears that a commission issued from James Monroe, President of the United States, to Robert Houston to survey the lands reserved for the Indians within the State of Tennessee, but not those reserved for the Indians in North Carolina. Of course, that commission can have no bearing on the case. A letter from the Secretary of War to Robert Houston was given in evidence, authorizing him to survey the lands reserved for the Indians in North Carolina. I am not prepared to say that that is a legal authority for making the survey. However, (173) it appears that the defendant is in possession of the land contained in plaintiff's declaration. Of course, he is in possession of the plaintiff's improvements and the land adjoining thereto, to which the plaintiff has a right under the treaty.

I do not pretend to say that the plaintiff has any right to recover in this case upon any title which he or his nation had before the treaties of 1817 and 1819. Before that time their right was a national right; no individual had any distinct right to any particular part, but they all had a right to the whole. The national right was the subject of contract when the treaties were made. It was the consideration for which the United States lands were given on the west side of the Mississippi, and the general relinquishment of it was the consideration for which certain reservations were made by the same treaty (one of which the lessor of the plaintiff has acquired title to and holds it, not as one of the Cherokee tribe, but as a citizen of the United States under the treaty).

It has been objected that their title has not been evidenced by a grant. This objection would be good if the land in dispute was claimed under those laws which point out the manner of acquiring title to vacant lands in this State. But that mode is not pointed out by the treaties under which the plaintiff claims; his title is the treaty, which treaty is recognized by North Carolina. It is not an uncommon thing in this State to claim title directly under an act of Assembly. The trustees of the University claim title to the escheated lands in this State under an act of the Legislature; no grant was ever made to them.

It has been said in argument that the commissioners had no authority to give away the Indian lands; that the present case is one of a gift to the plaintiff. When it is remembered that the possession and use of the lands were guaranteed to the Cherokee nation both by this State and the Congress of the United States, and that the Indians gave up the possession of those lands, with the exception of the reserved lands, for lands beyond the Mississippi; and that if those reservations had (174) not been made a greater quamtity of lands would have been insisted on by the Indians, in addition to those which have been given them west of the Mississippi—I say, when these things are kept in view, we must consider the plaintiff as a purchaser of the land; and that he claims it under a legitimate exercise of power by the commissioners, acting under the authority of the United States, and that the stipulations in the treaties of 1817 and 1819 have been acknowledged and recognized by the State of North Carolina in the several acts of Assembly which she has passed from 1819 up to the present time. From all these considerations I think the rule for a new trial should be discharged.

HENDERSON, J., assented.

PER CURIAM. No error.

Cited: Frazier v. Cherokee Indians, 146 N. C., 481.

DOE ON DEMISE OF YO-NA-GUS-KEE v. COLEMAN.—From Buncombe.

When a document is offered in evidence, purporting to have subscribed thereto the name of a public agent, his signature must be proved.

THIS case was in all respects similar to the last, except that in this case plaintiff, at the time of the ratification of the treaty of 1819, was living on the land contained within the lines of his survey.

An objection was taken on the trial below to the certificates of R. J. Meigs and Colonel Houston, because there was no proof that they were executed by the persons whose acts they purported to be; but the objection was overruled.

PER CURIAM. The certificate of enrollment according to the treaty ought to have been proved like any other documentary evidence. We do not know that R. J. Meigs has really signed the paper; it is not made evidence by law any more than the certificate of any other individual. There must be a

PER CURIAM. New trial.

(175)

STATE v. LAMON.—From Columbus.

1. An indictment for murder, which stated that A. B., late of Bladen County, etc., with force and arms, in the *county aforesaid*, etc., was held to contain a sufficient description of the place where the murder was alleged to have been committed.

2. In capital cases there is no need of a *formal* joining of issue preparatory to trial. The prisoner's plea and the joining of issue called the *similiter* are *ore tenus.*

3. When a prisoner in a capital case has once pleaded, he is bound to abide by the defense which he has chosen. The court may, in its discretion, permit him, for instance, to withdraw the plea of not guilty and plead in abatement; but the prisoner cannot claim to do so as matter of right.

4. After conviction on an indictment for murder, the objection cannot be taken that one of the grand jury which found the bill was also one of the coroner's inquest which sat on the body of the deceased.

5. A prisoner removed his trial to an adjacent county, and the record sent with him stated that the grand jury was "duly drawn, sworn, and charged." It is not a good objection that the record does not state that the grand jury was drawn from the original panel; for by our law grand juries can be drawn only from the list of original *venire;* nor is it necessary that a record should set forth the *formula* by which a grand jury is constituted.

6. The sheriff summoned as talesmen persons who were not bystanders in the courthouse. *Held*, that the calling them into court was a sufficient summoning; when they came in they were bystanders and bound to serve. Whether the court could have fined them for nonattendance, *quære*.

7. An order to the sheriff to summon talesmen need not be made returnable on the same day on which it issued.

8. The law is silent as to the number of talesmen which a sheriff must summon. It therefore belongs to the court, in its discretion, to determine the number; and should it not do so, the sheriff is left to summon such number as he may deem necessary.

9. An act done by the Superior Court in the exercise of a legal discretion is not the subject of appeal to this Court.

INDICTMENT for murder. The words of the indictment which it is material to state were as follows: "The jurors for the State (176) upon their oath present that Alexander Lamon, late of Bladen County, laborer, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the 29th day of August, in the year of our Lord 1823, with force and arms, *in the county aforesaid,* in and upon one James McMillan," etc.

The prisoner on his arraignment pleaded "Not guilty," and, before he was put on trial, moved for leave to withdraw his plea and plead in abatement, a fact which was admitted, viz., that the foreman of the grand jury which found the bill was also one of the coroner's inquest which sat on the body of the deceased, and, further, that the record sent from Bladen, from which county the cause was removed by the prisoner, did not show that the jury which found the bill was composed of members of the original panel. The court refused the motion and proceeded to the trial.

When the *tales* jurors were returned, the prisoner challenged the array after the petit jurors of the original panel were either challenged or accepted: First, because the order of the court did not direct the sheriff to summon bystanders, and the talesmen returned were not bystanders; second, because the order was not made returnable on the same day on which it was issued; and, third, because the order directed the sheriff to summon too great a number of jurors (75), six of the original panel having appeared. The prisoner's challenge was not allowed.

On the trial the prisoner attempted to establish an *alibi,* and introduced a witness who swore that on the night of the murder he was at the prisoner's house, and when going away the prisoner said he wished to go to one McLenan's, and requested the witness to accompany him. Witness said he would do so if the prisoner would go by the house of the witness, to which the prisoner consented. When they arrived at the house of the witness, the prisoner was requested to remain all night, which

(177) at first he refused to do, but afterwards, remarking that it was too late to go to McLenan's, consented. Witness and prisoner laid down to sleep about 12 o'clock; how long witness slept he did not know, but on awaking thought the moon between two and three hours high, and found prisoner preparing to depart, and he soon went away.

The presiding judge, on this evidence, remarked to the jury that it was probable the prisoner had some intention in his visit to McLenan, and it was the business of the jury to ascertain whether he had or not, and what it was, if he had any; and also what effect it would have in the cause.

The prisoner was found guilty, and moved in arrest because, first, there was no sufficient description of the place where the assault was alleged to have been committed; second, there was no issue joined between the State and the prisoner, there having been no replication to prisoner's plea. These reasons were overruled, and from the judgment pronounced the prisoner appealed.

TAYLOR, C. J. It cannot be collected from the charge that the judge gave an opinion to the jury whether any matter of fact was sufficiently proved or not. After summing up the circumstances attending the conduct of the prisoner while at the witness's house, as described by the witness, the judge remarks that it was probable the prisoner had some intention, and that the jury must ascertain whether he had or not, and if he had, what that intention was, what effect it would have in the cause. It was proper that those circumstances should have been distinctly presented to the view of the jury, that they might consider what inference they warranted, either of the prisoner's innocence or guilt; and if the judge had instructed them that from these circumstances they ought to infer either guilt or innocence, it would have been a departure from his prescribed duty. But this is cautiously and properly avoided, and the evidence is left without influence to the jury to decide whether (178) it established the fact for which it was adduced.

The first reason in arrest is that there is no sufficient description of the place where the assault is alleged to have been committed by the prisoner. But the indictment states the prisoner to have been late of Bladen County, and in the same sentence states that the assault was committed in the county aforesaid. If the county had been stated in the margin alone, and but one county named in this case, the words "county aforesaid" have sufficient reference to the county in the margin. 1 Saund., 308, note 1. The second reason in arrest is equally untenable, for in capital cases the issue is immaterial, for the plea and the joining of issue called the *similiter* are *ore tenus*, nor is it usual to make up a formal issue preparatory to the trial, or to consider the total omission of the *similiter* as sufficient to invalidate the proceedings. 4 Burr., 2084. This peculiarity arises from the nature of the trial, in its origin, which was considered in the manner of an inquisition, charging the jury to inquire into the truth of the charge against the prisoner.

It is complained of that the prisoner moved the court for leave to withdraw his plea of not guilty, and to plead in abatement, or to add a plea in abatement, to the plea of not guilty, which the court refused. This, however, was a subject altogether within the discretion of the court, and could not be claimed as a matter of right, for when the prisoner had once pleaded he was bound to abide by the defense he had chosen. An act done in the exercise of a legal discretion is not the subject of appeal to this Court.

Whether the objection that one of the grand jury had been on the jury of inquest would have been valid if made at a proper stage of the case, it is not necessary to decide; for it has heretofore been adjudged that such an exception cannot be taken after conviction. *S. v. McIntire,* 4 N. C., 267. (179)

The objection that the record does not state the grand jury was drawn from the original panel returned to Bladen Superior Court cannot prevail. The record transmitted to this Court informs us that the grand jury in the Superior Court were drawn, sworn, and charged. From what could they be drawn except from the list of the original venire? But independently of this the record states that the grand jury returned into court the indictment and so much credit is due to the court that it must be believed that the grand jury was selected in the manner appointed by law. It is not necessary that the record should state the formula and process by which the grand jury is constituted. Being a grand jury, we must understand that they were constituted by the means and through the ceremony required by law; for if they were not so constituted, the objection is at least as serious as some of the others taken to the conviction, and would in all probability, have been made by way of affirmation on the part of the prisoner, and been established by proof of the fact.

The remaining objection is that relative to the summoning of the talesmen, and is divided into three parts: First, that the order did not direct the sheriff to summon bystanders, and that the jurors so called were not summoned from among the bystanders; second, because the order was not made returnable the same day on which it was issued, but the next day; third, because the order directed the sheriff to summon too great a number of persons, six of the original panel having appeared.

1. The order directed the sheriff to summon good and lawful men, and if the order had been disobeyed the sheriff was answerable to the

court; but if the persons attended, the calling them into court was a sufficient summoning; they were then bound to serve, and were also qualified, although they had been called from a distance. Whether the court could lawfully have fined them for that they were (180) not about the courthouse when summoned is another consideration. But being assembled there, there is nothing in the law to prevent them from being lawful talesmen.

2. The law does not require the order to be returnable the same day; it only requires the talesmen to be every day discharged. The time when they are summoned does not enter into their qualification to serve, though it may operate on the mind of the court not to enforce their service.

3. Seventy-five talesmen were directed to be summoned; and as the law is silent with respect to the number, it unavoidably belongs to the discretion of the court to specify the number that it may deem necessary; or, if the court make no direction, to leave it to the sheriff to summon the number he may think necessary. In a capital case where the prisoner has thirty-five peremptory challenges, and an unlimited number for cause, the number summoned seems reasonable; more especially in a case where the prisoner had sworn that unfounded reports, tending to inflame the public mind, had been in circulation in the county whence the cause was removed, and that a large number of freeholders had formed and expressed an opinion unfavorable to him. It was extremely probable that this prejudice and excitement would extend into the county where he was tried, and thereby disqualify many of the persons who were summoned from serving. It was therefore every way proper that a large number should be summoned. I am consequently of opinion that the motion for a new trial, and the reasons in arrest of judgment, were properly overruled, and that there is no error in the record transmitted to this Court.

HENDERSON, J. I will subjoin a few remarks to the very satisfactory opinion delivered by the Chief Justice. First, on the objection, allowing it had been taken at the proper time, that one of the grand (181) jurors who found the bill was also one of the jurors who composed the coroner's inquest. Second, that the tales jurors were directed to be summoned from the county of Columbus.

It is undoubtedly good cause of challenge to one offered as a traverse juror that he was one of the jurors which composed the coroner's inquest, or the grand jury which had found the bill, for he had both formed and expressed an opinion on the subject; but it does not follow that it is a cause of challenge to a grand juror, or matter which should abate the indictment, that he formed one of the coroner's inquest, or had formed one of a grand jury which had found a bill for the same offense, or even in the very same words; for it seems that a prisoner may, at least in England, be tried on the coroner's inquisition, and it is now the daily practice to send other bills of indictment for the same offense to the same grand jury which found the first, and to try the accused on either; it would, therefore, seem, if this objection prevails, that if one of the grand jurors which found the bill had before been one of another accusing jury, that the accusation would be bad; but if the bill was found by all the persons composing the jury which found the first bill, that is, the same jury, or the same persons organized into another jury, that the accusations would be good. No authorities in point were produced on the trial and none referred to. I except Selfridge's trial, which I have not been able to procure, and I imagine but few can be found on the subject, for I think that the principle is so firmly fixed by the practice stated above that it has seldom been attempted. In my opinion, therefore, it would have been useless for the judge to have permitted the plea to be withdrawn that the prisoner might bring the fact before them.

I think that the other objection, that the tales was awarded of the freeholders of Columbus County, is equally unfounded; for I believe that upon the true construction of our statutes on the subject of jurors, the tales should come from the same county from which (182) the panel came; more especially in local actions. And this opinion is formed both from the words and spirit of our several acts, and not on a criticism of the word *tales.* But if others than the freeholders of Columbus had been competent jurors, it does not follow therefrom that *they* were *incompetent* or that the array should be challenged. It is the right and privilege of the prisoner that the jury should come *de vicineto,* now *de comitatu,* not that they should come from the State at large, even if any freeholder of the State was a competent juror. I mean to say that if the law required the jurors should come from a particular county to try the prisoner, it is his privilege that the jury should come from that county, and he may avail himself of it by challenge; but if other persons than freeholders of Columbus were competent jurors it is no cause of challenge that they did not compose part of the original or tales panel. The persons offered were competent jurors, although others might be so also. Challenge is not given to the prisoner that he should have a particular individual on his jury; but that he should *not* have one against whom he had an objection. The motion for a new trial and motion in arrest must be overruled, and judgment given for the State.

PER CURIAM. No error.

Cited: Bright v. Sugg, 15 N. C., 494; *S. v. Benton,* 19 N. C., 201; *Quiett v. Boon,* 27 N. C., 11; *S. v. Barfield,* 30 N. C., 354; *S. v. Harvell,* 49 N. C., 5; *S. v. Chavis,* 80 N. C., 357; *S. v. Davis, ib.*, 413; *S. v. Swepson,* 81 N. C., 575; *Phillips v. Lentz,* 83 N. C., 243; *Henry v. Cannon,* 86 N. C., 25; *Long v. Logan, ib.,* 537; *S. v. DeBerry,* 92 N. C., 802; *Dunn v. R. R.,* 131 N. C., 451.

(183)

STATE v. McNEILL.—From Cumberland.

A warrant issued to apprehend defendant, and on the 5th of October he was bound to appear at December term of the county court. On the 28 October a bill for the same offense was found against the defendant in the Superior Court, and when the defendant appeared in the county court in December a *nolle prosequi* was entered on the bill found against him at that term. It was held that as the effect of a *nolle prosequi* is to put the defendant, without day, upon the indictment to which it applies, he when in that situation becomes amenable on another indictment in any court having jurisdiction of the offense; otherwise a *nol. pros.* would amount to an acquittal.

On 23 September, 1822, a warrant issued to apprehend the defendant, who was charged with having committed an assault and battery; on 5 October, 1822, he entered into recognizance before a justice of the peace to appear at December Term, 1822, of Cumberland County court and at that term a bill of indictment was found, on which a *nolle prosequi* was entered at the same term.

At the term of Cumberland Superior Court which commenced on 28 October, 1822, this bill of indictment was found against the defendant for the same offense, to which at Spring Term, 1823, he pleaded his apprehension by warrant, and the finding of the bill in the county court, to which the solicitor for the State replied the *nolle prosequi,* and defendant demurred.

Norwood, J., who presided, sustained the demurrer and gave judgment for the defendant, from which the State appealed.

Per Curiam. The Court is of opinion that a bill of indictment having been found against the defendant in the county court at December sessions in 1822, for the same offense, is no defense against (184) the present indictment in the Superior Court, inasmuch as it appears on the pleadings that a *nolle prosequi* had been entered on the said first indictment prior to the time of pleading in this. That as the effect of a *nolle prosequi* is to put the defendant, without day, upon that indictment, he becomes while he is so, amenable to another indictment in any court having jurisdiction of the offense; otherwise a *nolle prosequi* would operate as a bar to any other prosecution. The power of issuing new process after a *nolle prosequi* cannot affect this question, because no process had been issued. The plea is, therefore, insufficient and must be overruled.

PER CURIAM. Reversed.

Cited: S. v. Tisdale, 19 N. C., 161; *S. v. Casey,* 44 N. C., 210; *S. v. Respass,* 85 N. C., 536.

STATE v. SEXTON.

1. **If an indictment charges an offense to have been committed on a day which is yet to come, it is as defective as it would be were no day laid.**
2. **Indictments are not within the statutes of jeofails. Being found by a grand jury on oath, the court cannot amend them without the concurrence of the grand jury which finds them.**

INDICTMENT for an assualt with intent to kill, tried before *Paxton, J.* The bill was found in March Term, 1824, and charges the offense to have been committed on 19 August, 1824. The defendant was put upon trial at the same term in which the bill was found, and after the jury was impaneled the prosecuting officer moved the court to amend the indictment as to the day on which the offense is charged to have been committed. The court overruled the motion, and the jury found the defendant guilty in manner and form as charged in the bill of indictment, and judgment was arrested because the offense was laid to have been committed on a day yet to come. (185)

PER CURIAM. It is a familiar rule that the indictment should state that the defendant committed the offense on a specific day and year, but it is unnecessary to prove in any case the precise day and year, except where the time enters into the nature of the offense. But if the indictment lay the offense to have been committed on an impossible day or on a future day, the objection is as fatal as if no time at all had been inserted. Nor are indictments within the operation of the statutes of jeofails, and cannot, therefore, be amended. Being the finding of a jury upon oath, the court cannot amend without the concurrence of the grand jury by whom the bill is found. These rules are too plain to require authority, and show that the judgment of the court was right, and must be

PER CURIAM. Affirmed.

Cited: S. v. Cody, 119 N. C., 909.

STATE v. ISHAM, A SLAVE.—From New Hanover.

The question to be tried on the plea of *nul tiel record* is a question of *fact* to be tried by the court, and not a question of *law*. And where the court below rejected a paper offered as a copy of the record because the seal attached to it was so indistinct that it could not be recognized as the seal of any court, this Court on appeal has no power to examine whether the fact as to the indistinctiveness of the seal be as stated or not; it must take it to be true as stated, and, of course, if true, the paper was properly rejected.

THE prisoner was indicted for grand larceny, found guilty, and prayed the benefit of clergy. To the prayer of clergy, the State, by its solicitor, objected on the ground that the prisoner had before been allowed his clergy on a conviction of grand larceny in Duplin County, and produced a paper purporting to be a transcript of the
(186) proceedings on the trial in Duplin, the certificate on which stated
it to be a true copy from the records, "given under *my* hand and seal," and signed with the clerk's name; the seal attached to this record was so indistinct and faint in its impression that it could not with certainty be ascertained what seal it was. The court below, *Norwood, J.*, presiding, refused to consider the paper produced as a copy of the record of Duplin, and allowed the prisoner his clergy, whereupon the State appealed.

TAYLOR, C. J. The Superior Court could only judge by inspection whether the record produced was an exemplification under the seal of the Duplin Superior Court; and as the impression of the seal is not more visible to us than it was to the judge who decided the case, it cannot be said that he has erred in point of law. The certificate of the clerk might have been referred to the seal of the court if it sufficiently appeared that such seal had been affixed to the record; but that does not appear, and we must consider this either as a record without seal or as under the private seal of the clerk. Where a record of the *same* court is put in issue it must be examined by the court on *nul tiel record;* but if it be a record of *another court,* an exemplification of it under seal must be produced. As it cannot be seen that this was done in the present case, the judgment must be affirmed.

HENDERSON, J. The question to be tried on the issue joined on the plea of *nul tiel record* is as much a question of fact as that arising on any other issue. It is true the court tries it, and not the jury, but that
does not change it to a question of law. Questions of law may
(187) arise on the admissibility of the evidence, and these questions this
Court can reëxamine, but not the evidense itself. The case states that the record was certified under hand and *seal* of the clerk, without

any reference to the seal of the court, and there was on paper something like the seal of the court, and probably was intended for it, but that the judge, from the indistinctness of the impression, was unable to recognize it as the seal of the court, and therefore rejected the evidence. If these are the facts (and we are bound to take them to be so, for we cannot reëxamine them), the record was properly rejected as evidence. *S. v. Grayton, post,* 187.

PER CURIAM. Affirmed.

Cited: S. v. Grayton, post, 187; *S. v. Raiford,* 13 N. C., 215; *S. v. Worley,* 33 N. C., 243; *Fain v. Edwards,* 44 N. C., 67; *S. v. Green,* 100 N. C., 422.

STATE v. GRAYTON & WILLIAMS.

The findings of fact upon a plea of *nul tiel* record are not reviewable on appeal.

THIS case was decided some terms ago, and has accidentally been overlooked. The statement of the case is not necessary for a correct understanding of the point decided. Enough appears in the opinion of the Court as delivered by

HALL, J. Where the plea of *nul tiel* record is pleaded it is referred to the court for decision, as issues of fact are referred to the jury. When these issues are all found, the judgment of the court is pronounced upon them; and when there is an appeal from that judgment, this Court can no more examine any question relative to the plea of *nul tiel* record than it can any question of fact relative to the pleas submitted to the jury. To be sure, in the present case there is no judgment regularly entered up, but we must take it that there is one entered suitable to the case.

This is not the case that a new trial is prayed for under the late act of Assembly on matter of fact submitted to the court. In such case the evidence offered in the Superior Court will be spread upon the record, of which this Court, as well as it can, will form a judgment. In this case we are not called upon to grant a new trial, because the evidence offered in the court below on the plea of *nul tiel* record was sufficient. That evidence is not before us. I, therefore, think that the judgment should be entered for the State.

Cited: S. v. Raiford, 13 N. C., 215.

(188)

STATE v. NEGRO ADAM.

The act of 1741 punishes an act committed by a slave with whipping and the loss of ears for the first offense, and with death for the second, on an indictment in the county court. The act of 1816 gives to the Superior Court jurisdiction of all offenses, the punishment whereof may extend to life, and in sec. 4 enacts that a slave convicted of a clergiable offense, shall have a clergy as a freeman. This clause does not give the Superior Court jurisdiction of the offense named in the act of 1741, although it may possibly be the second offense.

INDICTMENT tried before *Paxton, J.,* in NORTHAMPTON.

The bill charged the defendant with willfully and maliciously killing two mares, and concluded, "contrary to an act of the General Assembly in such case made and provided, and against the peace and dignity of the State." The indictment was quashed below for want of jurisdiction, and the State, by its prosecuting officer, appealed.

TAYLOR, C. J. This case involves the question whether the Superior Court has jurisdiction of the offense charged in the indictment, the solution of which is unattended with difficulty, after looking at the several acts relative to the offense and the trial of slaves. The crime may be said to have been created by the act of 1741, which annexes to the first offense the punishment of loss of ears and discretionary whipping, and to the second offense death. The punishment and trial of this offense was transferred by Laws 1793, ch. 381, to the county courts by the general description of all such offenses, the punishment whereof extended to life, limb, or member, which at the same time entitled the slave to the right of trial by jury. The subsequent act of 1816 gave to the Superior Court jurisdiction of all offenses the punishment whereof may extend to life, leaving still with the county court the trial of all those where the punishment was confined to limb or member.
(189) Thus far the subject is clear of doubt. But Laws 1816, ch. 912, sec. 4, enacts that a slave convicted of a clergiable offense shall be entitled to benefit of clergy in like manner with a free man; a provision which, it is argued, denotes that the Superior Court jurisdiction embraced other cases than those where the punishment was death; and that by analogy a case where the second conviction *inferred* the penalty of death belongs in like manner to the Superior Court. That the punishment of this offense may extend to life as much as the punishment of grand larceny, viz., upon the second conviction; and that the punishment of the first offense by the act of 1741, being aggravated greatly beyond that of grand larceny, enlists every consideration of justice and policy on the side of sustaining the jurisdiction of the Superior Courts.

To this the answer is that grand larceny is a capital offense, and by the common law is punishable with death; and it is only by the merciful extension of the benefit of clergy by the modern statutes that a person guilty of it is excused the pain of death. 4 Bl., 239. But it is still considered, in contemplation of law, as punishable with death, and is always comprehended in the description of those crimes the punishment whereof may extend to life. The crime in the indictment, on the contrary, was originally, and from its first creation, punishable only by whipping and the loss of ears, and now by death on the second conviction, and therefore cannot be understood as one of those described in the act of 1816. It is consequently very plain that the Superior Court has not original jurisdiction, and the judgment must be affirmed.

HALL, J. By Laws 1816, ch. 912, it is declared that in all cases in which a slave or slaves shall be charged with the commission of an offense the punishment whereof may extend to life, the Superior Courts of law shall have exclusive jurisidction. (190)

In the present case the punishment due to the offense charged is "cutting off both ears and public whipping," and although it is death for committing a second offense of the same kind, in which case the Superior Courts would have jurisdiction, that consideration will not give them jurisdiction in the first instance against the express words of the act. I, therefore, think the judgment of the court below ought to be affirmed.

HENDERON, J. The Superior Court has jurisdiction in the trial of slaves, in cases only affecting their lives, see act of 1816. But as the punishment of death is, by the act of 1741, to be inflicted, upon a conviction for the *second* offense for which this slave is indicted, it is argued, therefore, that the Superior Court has jurisdiction, as this *may* be the second offense; and it is likened to the cases of simple grand larceny, from which the benefit of clergy is not taken away by any *statute,* and *S. v. Isham, ante,* 185, is cited to support the latter position.

The cases are by no means analogous. Grand larceny is punishable with death by law. The benefit of clergy averts the punishment; it does not change the law. *Non constat,* before it is demanded, which is always after conviction, that the defendant will pray benefit of it, or will be entitled to it, for he is entitled to it but once; and when demanded, it may be resisted on that or any other ground, by counter plea, *ore tenus.* The grounds of such resistance are never stated in the indictment, but where the second offense is more penal than the first, at least where it is a capital offense, the first not being so. Its being a second offense constitutes it a part of the crime, and if so, it should be stated in the indictment. *People v. Young,* 1 Caine N. Y.

Term, 37. At all events, it should be so stated when its being the *second* offense gives jurisdiction to the court; for I think it (191) would be absurd to make the *right of trying* dependent on a fact *afterwards to be ascertained,* and which, therefore, may *not* be. The judgment should be

PER CURIAM. Affirmed.

Cited: S. v. Allen, post, 616.

STATE v. COLLINS.

An indictment charging defendant with having in his possession "one pair of dies, upon which were made the likeness, similitude, figure, and resemblance of the sides of a lawful Spanish milled silver dollar, etc., for the purpose of making and counterfeiting money in the likeness and similitude of Spanish milled silver dollars," was held to charge with sufficient certainty the offense designated in the act of 1811, ch. 814, N. R.

APPEAL from *Nash, J.,* at LINCOLN.

The indictment charged that the defendant "on the 1st day of October, in the year of our Lord one thousand eight hundred and twenty-three, with force and arms in the county aforesaid, one pair of dies, upon which then and there were made and impressed the likeness, similitude, figure, and resemblance of the sides of a lawful Spanish milled dollar, without any lawful authority, then and there feloniously had in possession," etc., "for the purpose of then and there making and counterfeiting money in the likness and similitude of Spanish milled silver dollars, contrary to the statute in that case made and provided, and against the peace and dignity of the State."

The defendant was found guilty before *Nash, J.,* and moved in arrest that the words of the act of Assembly which create the offense are not used in the indictment. Motion in arrest overruled; judgment, and appeal.

TAYLOR, C. J. It does not admit of any reasonable doubt that a pair of dies is an instrument or instruments within section 4 of the act of 1811, chapter 814, upon which the first count is framed, and being more generally used in coinage than any other instrument, is one (192) upon which the act would be most likely to operate frequently. It may be said that as the dies are described as having impressed upon them only the likness, similitude, figure, and resemblance of the sides of a Spanish milled dollar, and not the edges, that they cannot answer the purpose described in the act, of making a counterfeit similitude or likeness of a Spanish milled dollar. But it is for the jury to consider whether the dies be calculated to impress the counterfeit similitude or likeness of a dollar; for these words in the act extend the offense beyond an exact imitation of the figures and marks of the coin; for if the instrument in point of fact will impose on the world in general, it is sufficient, whether the imitation be exact or not. And this is the construction upon those highly penal acts relative to the coin in England. Thus, having knowingly in possession a puncheon for the purpose of coining is within the Statute of 8 and 9 Will. III., though that alone, without the counter puncheon, will not make the figure; and though such puncheon had not the letters, yet it was held sufficiently described in the indictment as a puncheon which would impress the resemblance of a headside of a shilling. 1 East P. C., 171. But if the parts of this indictment which are employed in a description of the dies were altogether omitted, the charge would be within the act, for it would then read that the defendants had in their possession a pair of dies for the purpose of making counterfeit dollars, which is the crime in substance created by the act. As I do not perceive any ground for any other objection arising from the record, the case having been submitted without argument, my opniion is that the reasons in arrest be overruled. And in this opinion the rest of the Court concurred.

PER CURIAM. Affirmed.

(193)

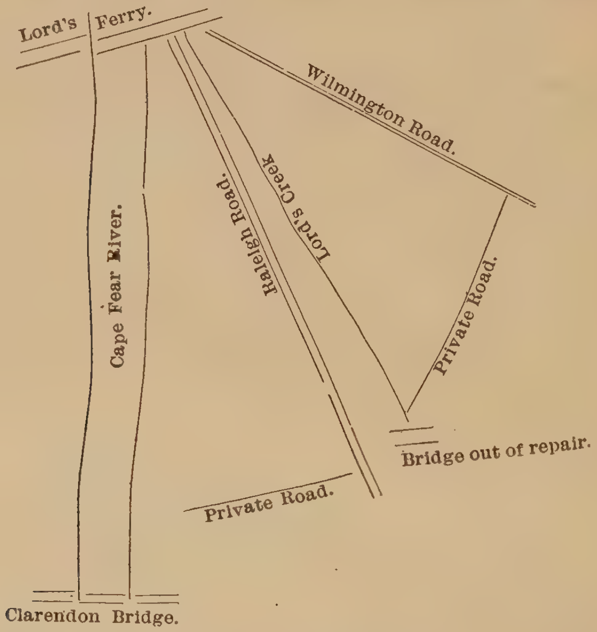
STATE v. SEAWELL AND OTHERS.—From Cumberland.

Where the proprietors of a public bridge, in order to draw travelers from a public ferry, open a private road, by permission of the owner of the soil, above the ferry, leading to the foot of the bridge, and over an intervening creek, such proprietors are not indictable for any defect in the small bridge.

INDICTMENT for not repairing a bridge. A special verdict was returned, in substance as follows:

The defendants are the proprietors of a toll-bridge, called Clarendon Bridge, erected on the river Cape Fear at Fayetteville by an act of the Legislature passed in 1818. On the river south of the bridge there is a ferry, called Lord's Ferry, at which the public road from Wilmington meets the public road from Raleigh; between these roads runs a creek called Lord's Creek, which empties into the river at the ferry, and to pass from the Wilmington to the Raleigh road, above the point of junction at the ferry, it is necessary to cross Lord's Creek. The defendants, by permission of the proprietors of the soil, have erected a private road from the Wilmington road to Lord's Creek, and also a private road from the foot of Clarendon Bridge to the Raleigh road; and have placed a bridge over Lord's Creek, so as to open a communication between the Wilmington and Raleigh roads above the ferry; and at the point at which the private road leaves the Wilmington road they have erected a signboard with the inscription, "The best way to Fayetteville." The road leading from Wilmington across the Raleigh road is much used, and those who come from Wilmington must travel this road and cross Lord's Creek if they enter Fayetteville by means of Clarendon Bridge,

The bridge erected by the defendants over the creek was out of repair when the bill was found. Verdict for defendant. State appealed.



HALL, J. It is admitted that the road which led over the (194) bridge in question was not a public road; it had not been established by law. There was no contract between the defendant and the public in consequence of which the bridge was built; and the building of the bridge could not certainly create a contract by which the defendant was under any obligation to the public to keep it in repair. He put it there by the consent of the owner of the land, there was no obligation on him to do so, and his having done so creates no obligation on him to keep it up.

TAYLOR, C. J., and HENDERSON, J., concurred.

PER CURIAM. No error.

IN EQUITY

(196)

GRANTHAM v. BIZZELL AND OTHERS.—From Wayne.

1. This Court on bill filed to correct mistakes in a deed will refuse its aid, though the mistakes should be obvious, if the deed was obtained under oppressive circumstances.

2. As to the money paid for the land, the bill did not offer a reconveyance, and pray to have it refunded, and the court, therefore, held that it could give no relief as to the purchase-money.

THE bill stated that Joseph Bennet was seized of a tract of land, which he purchased of Jesse Grantham, and on 11 December, 1792, conveyed to complainant 20 acres thereof, describing it by metes and bounds; afterwards complainant came to an agreement with Bennet for the purchase of the residue, 137 acres, at the rate of $1 per acre, and on 10 May, 1794, Bennet executed to complainant a deed for the same, describing it by metes and bounds. The tract of 20 acres was bid off by complainant at a sale of Bennet's property under execution, and when complainant purchased the 137 acres he agreed to give Bennet $1 per acre for the 20 acres also. After the purchase money was in part paid, Bennet endeavored to avoid delivering possession thereof, pretending that the conveyance was not good, because his wife had not joined therein, whereupon complainant brought suit against him, and Bennet agreed to deliver possession and pay the costs, which he did, and complainant then paid him the balance of the purchase money and took possession and cultivated the land during Bennet's life and for a long time afterwards, and complainant avers that it was Bennet's intention to convey the whole of the land which he purchased from Jesse Grantham. The bill then charged that since Bennet's death the defendants, his heirs at law, combining with one Brittain Hood, (197) brought an action of ejectment against complainant, and recovered a large part of the land; that the lines mentioned in the deed for 137 acres were erroneous and left out a large portion of the land; and the heirs, availing themselves of this error, entered on the part left out of the deed, and conveyed the same to Hood, who purchased with full notice of complainant's claim. The bill prayed that the mistake might be rectified. The heirs at law, answering, said they had sold their right to Hood, and disclaimed all title.

Hood in his answer stated that after the recovery in ejectment by the heirs he purchased their right, and denied any knowledge of Bennet's design to sell the *whole* of the land; but, on the contrary, averred that

Bennet, being a man of weak mind, and connected by marriage with complainant, was prevailed on to convey a part of the land to him under a belief that it was a conveyance in trust. Bennet occupied the land afterwards, and often in complainant's presence said he had not sold to him. Afterwards complainant conspired with some of the neighbors to drive Bennet from the neighborhood, and Bennet was taken and beaten, confined and ill-treated; and while thus confined complainant forced upon him a note of one Bizzell for $40, and the sum of $4 in money, and then alleged that he had bought and paid for the land.

The cause was heard on bill, answer, and depositions, and the Court's opinion was delivered by

HALL, J. No doubt can be entertained but that it was the intention of the parties that the whole of Bennet's land should be conveyed to the complainant; but the circumstances attending the purchase (let Bennet's character have been so bad) were so oppressive as that he could not be considered a free agent in making the sale. And although (198) in the present proceedings the sale which he made cannot be disturbed, yet I think the Court ought not to assist in rectifying a mistake which was made in the deed obtained under such circumstances.

It may be asked whether Bennet shall retain the money paid and the land also. The answer is that the bill is not so framed as that relief can be given as to the money paid; if it were, and the complainant proffered to reconvey the land, which was conveyed to him, an inquiry of that sort would be made; or if there were a cross bill I should be for rescinding the contract and decreeing the money paid to be returned. As that is not done, and the complainant wishes the contract to be fully carried into effect, for the reasons given before, I think the bill ought to be dismissed.

HOLLIDAY AND OTHERS v. PORTER AND BRAND.—From Greene.

A bill charged that husband, before marriage, made to his wife a bond, payable after his death, for £30,000, for the purpose of defrauding creditors and that the administrator, by contrivance with the widow, was about to confess judgment thereon before the creditors could sue at law, and prayed an injunction and general relief; the answer admitted the existence of the bond for £30,000 as charged that suit was brought thereon against the administrator, and denied all design to defraud creditors, and the court sustained the injunction until the hearing.

THE bill stated that the complainants were the executors of William Holliday, and as such creditors of one James Porter, who executed to the complainants his obligation for the payment of $234; that James Porter died intestate and largely indebted, leaving his (199) widow, one of the defendants, surviving him, and administration of his estate was committed to Brand, the other defendant, and charged that the defendants, combining to defraud the creditors of James Porter, the administrator Brand refused to pay the debts of his intestate, pretending that the assets were first liable to satisfy a bond given by James Porter to his wife, dated before marriage, and made payable to her after his death for the sum of £30,000, and that such bond was more than sufficient to exhaust the assets; the bill further charged that the bond was given for the sole purpose of defrauding creditors, that it was not proved or registered, and during the lifetime of James Porter its existence was kept secret while he was in possession of a handsome estate, the property of his wife prior to her marriage, and by means thereof obtained extensive credit. The bill further charged that Brand, at the request of the widow, procured himself to be appointed administrator, and intended at the ensuing term of Greene County court to permit a judgment to be entered against him in some summary way on said bond in order to create thereby a lien on the assets in his hands in favor of the widow to the exclusion of the fair creditors of James Porter, who would be delayed in obtaining judgments on their claims by the ordinary forms of law. The bill concluded with a prayer for an injunction and for general relief.

The widow in her answer stated that at the time of the treaty of marriage between her and Porter she was possessed of real and personal estate of large value, while Porter possessed very little property; upon the treaty Porter proposed to secure to his intended wife her estate, but she, desirous of advancing Porter's interest and having confidence in him, preferred that he should execute the bond mentioned in the bill, and he accordingly did so. The answer admitted that she had sued Brand on the bond, which was not proved or recorded and the existence of which was not generally known. (200)

The answer of Brand, the other defendant, stated that suit was brought by the widow upon the bond, and he was advised that as representative of his intestate he could not object to the bond, and that he had not confessed judgment thereon, though he had since on another claim which exhausted all the assets of James Porter.

Upon the coming in of the answers a perpetual injunction was decreed, with costs, whereupon defendants appealed. And now the cause coming on in this Court upon bill and answer—

PER CURIAM. Let the injunction be continued till the hearing.

HENDERSON, J., remarked that the answer did not admit complainants to be creditors, as they alleged, and that as yet the Court had no testimony on that point.

COLEMAN v. COLEMAN AND CRUMPLER.—From Lenoir.

The court, on a bill filed for that purpose, will protect the rights of those who are entitled to slaves after the determination of a life estate by compelling the owner for life, or those claiming under him, to give bond to abide by and perform the final decree which may be made in the cause.

THE bill stated that Thomas Coleman died in 1791, leaving a last will by which he bequeathed certain negroes, Jasper and Doll, to his wife, one of the defendants, during her life, and after her death to his (201) two daughters. The negroes went into the wife's possession, and, since the death of Thomas Coleman, Doll has had numerous issue; that the wife had sold or caused to be sold three of the children of Doll to the defendant Crumpler, of Sampson County, or to some other person who has sold to Crumpler; that the wife has in her possession nine other children of Doll, and the bill stated that the complainant, who was the legal representative of the children, feared that Crumpler would cause the negroes which he held to be conveyed out of the State, and that the wife would dispose of those in her possesssion, and prayed that the defendants might be compelled to give bond for the forthcoming of the negroes in their possession respectively on the death of the wife, and that they should not in the meanwhile be removed out of the State; and further writs of subpœna, and also capias, *ne exeant,* or other proper process compelling the defendants to give security for their appearance.

The wife by her answer admitted complainant's claim under the will, but denied any intention to dispose of the property so as to injure the future interest of others, and stated that she had conveyed her interest only in three of the children of Doll to one Loftin.

The defendant Crumpler stated that he purchased absolutely of Loftin three negroes, which he had since sold; that this purchase was fair, *bona fide,* for a valuable consideration, without notice of complainant's claim or title.

The cause having been set for hearing was removed into this Court by affidavit; and now,

PER CURIAM. Let a capias issue against the defendant Crumpler to hold him in custody until he give security in the sum of $2,500, conditioned to abide by and perform the final decree of the Court in this case.

WADE AND OTHERS v. PARKS AND WIFE AND WASDEN.—From Greene.

On the facts set out in bill and answer the defendant held to bail to perform final decree of the court.

THE bill was filed by the children of Lemuel Wade, deceased, and set forth that Lemuel Wade by his will bequeathed certain negroes to his wife for life and after her death to the complainants; that after taking possession of the negroes the widow intermarried with one Parks, and that Parks had sold the negroes to Watson, who had conveyed the same out of the State or to some remote part thereof. The bill prayed that Parks and Wasden might be decreed to enter into security for the production of the negroes when the life estate expired, and lest the defendants should abscond or remove before complainants' case could be heard, it further prayed that they might be held to bail.

The answer of Parks and wife admitted the claim of the children under the will, and stated that Parks had sold the life estate of his wife only to Wasden.

Wasden's answer stated the purchase by him from Parks of his wife's life estate, and that he had sold the same interest to one Williams of Columbus County and one Smith of Sampson.

And the court, upon the reading of the bill and answer, ordered that a *capias* issue against Wasden to hold him in custody until he give bond and security, conditioned to abide by and perform the final decree of the court in this case.

BURGWIN v. RICHARDSON.—From New Hanover.

If an obligation and a mortgage be given to secure the payment of money on a bill to foreclose, alleging the loss of the obligation and offering an indemnity, it seems the loss of the bond *must be proved;* otherwise, the court will not compel the mortgagor to accept a counter security.

RICHARDSON bound himself by an obligation, dated 12 February, 1812, to pay to Burgwin $1,621 on 12 August, 1814, and to secure such payment by deed of bargain and sale of even date with the bond conveyed to Burgwin certain slaves and land, with a proviso in the deed that it should be void if the obligation was paid.

The bill was filed March, 1820, and set forth the above facts, and that Richardson had made certain payments, but that great part of the debt was still due, and that interest had accrued; that the obligation *had been lost or mislaid by accident,* and that Richardson had been requested to pay, on indemnity offered, and had refused, and prayed a foreclosure of the equity of redemption of the property mortgaged, and general relief.

The answer admitted the execution of the obligation and mortgage as charged, and claimed an allowance for certain payments; it neither admitted nor denied the loss of the obligation, and an offer of indemnity specially, but concluded with a general traverse. There was no proof in the cause; it stood for hearing on bill and answer, and a report of the master ascertaining the amount due on the obligation. To the (204) report there were several exceptions, none of which was allowed by the court.

Gaston for complainant.
Hogg contra.

On behalf of the defendant it was moved to dismiss because there was no proof of the loss by accident, as alleged in the bill. It was contended that as the obligation was negotiable by our law, that it should be produced or accounted for, and that the court would not compel the defendant to accept a counter security but *upon proof* that the negotiable security had been lost; otherwise the presumption that the obligation had been negotiated, and that it had been lost by accident, was equal, and the complainant could not call on the court to affirm by their decree that it had not been negotiated, but had been lost.

To this it was answered that the obligation had been lost when the bill was filed, but had been subsequently discovered, and was now in possession of complainant's counsel below, and a motion was made for a decree, to go into effect upon the production of the obligation to the clerk of this Court.

After the offer to produce the obligation, the motion to dismiss failed, but the Court refused to make any decree until the obligation should be produced in this Court. On another day Gaston produced the obligation, and the Court decreed for complainant.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

DECEMBER TERM, 1824

WELLBORN v. YOUNGER.—From Wilkes.

1. A deposition shall not be rejected because it is certified simply that the witness was sworn to the truth of the deposition without stating that he was sworn to testify the truth, the whole truth, and nothing but the truth.
2. A new trial will sometimes be granted on the ground of surprise in matter of law.

Action on the case in which the plainitff declared for a deceit in the exchange of horses, and was tried below before *Badger, J.*

After the plaintiff had closed his case the defendant's counsel offered to read in evidence the deposition of one Eli Miller. Due notice of the time and place of taking the deposition had been given; but the evidence was objected to, and rejected by the court on the ground that the witness not appearing to have been sworn to depose the truth, the whole truth, and nothing but the truth, but simply having been sworn to the truth of the facts stated in the deposition, and the plaintiff not having attended to cross-examine, it was mere affidavit *ex parte.* The defendant's counsel then stated that he had seen and examined the deposition before the trial with a view of ascertaining whether it was regularly taken and could be read; that he had not discovered or had any idea (206) of such an objection, nor had he supposed that it would be either taken or allowed; that the deposition was considered by him as all-important in his defense, and expressed a hope that the court would grant him a new trial on the ground of surprise, unless the opposite counsel would consent to a mistrial. The opposite counsel refused to consent, and the judge declined expressing any opinion at that time whether a new trial would be awarded on the ground of surprise.

The defendant's counsel then proceeded to examine several witnesses to make out his defense, and the case was argued to the jury and a verdict insisted on for the defendant on the evidence offered. The jury found for the plaintiff, and defendant moved for a new trial, first, because the court had improperly rejected the deposition, and, secondly, on the matter of surprise before mentioned. As to the first, the presiding judge retained the opinion expressed at the trial; and, as to the second, it was held that the defendant could not have a new trial, because, first, the deposition having been seen and examined, and the objection being apparent on its face, it was a surprise as to matter of law and not matter of fact; and, second, because he did not submit to a verdict on discovering that his deposition could not be read, but went on, examined witnesses, argued his case to the jury, and insisted on a verdict on the proof he had offered; and he ought not thus to take two chances, but should be bound by the election he had made to try his case before the jury rather than depend on the ground of surprise.

Judgment was rendered for plaintiff, and defendant appealed.

TAYLOR, C. J. The common form of administering an oath is so familiarly known to all persons in any degree conversant with (207) the trial of causes that it is a very reasonable presumption that magistrates who are in the daily practice of transacting such business are conusant of it; and when they certify, on a deposition taken under the authority of a commission, that a witness was sworn, a presumption arises *prima facie* that he was duly sworn according to the forms and ceremonies of law. In the act concerning oaths, passed for the very purpose of prescribing the mode of administering them, the Legislature has presumed that the practice and detailed form was known to every person competent to administer them, or, at least, has not thought it necessary to recite it in the act, but leaves it to be gathered from common law and common usage. 1 New Rev., ch. 269. The certificate to this deposition states that the witness was sworn on the Holy Evangelist, but I should have thought it quite sufficient if it had simply stated that the witness was sworn, inasmuch as every witness is legally sworn who takes an oath according to the ceremonies of his peculiar religion, as a Jew on the Pentateuch, and a Gentoo and all others according to the belief in which they are educated. So the affirmation of a Quaker, and of the other sects enumerated in the act of 1777, are equally valid with an oath, however solemn. However the forms may differ, the substance and meaning are the same in all, viz., calling God to witness what we say, and imprecating His vengeance if we assert a falsehood. When a person is prosecuted for perjury, committed in an answer of chancery, it is according to the regular practice, and rendered necessary by the course of business, to prove that the defendant took the oath, by the production of the *jurat,* attested by the person before whom it was taken. Such proof is sufficient at least to put the party upon showing or raising a reasonable presumption that he was personated; otherwise it has been thought almost impossible to convict a person of a perjury so committed. 2 Bac., 1189. If the certificate were defective on principle, which I do not think it is, the generality of the usage of so making them, with very few exceptions of a more (208) formal statement, was enough to surprise a counsel who examined a deposition with a view to ascertain whether it was regularly taken. My opinion consequently is that there ought to be a new trial on the ground of the rejection of legal evidence, and on the ground of surprise, which, although it might be in matter of law, is not therefore an insufficient reason, for in enumerating the reasons for a new trial *Mr. Justice Blackstone* states as one, "that either party may be puzzled by a legal doubt which a little recollection would have solved." 3 Bl., 390.

HALL and HENDERSON, JJ., concurred in granting a new trial.

PER CURIAM. New trial.

CLARK v. BLOUNT AND WIGGINS' EXECUTORS.—From Washington.

1. In an action of debt against an executor several pleas were pleaded, and among others a want of assets; and the plaintiff supported all of the other issues by proof, but called no one to prove that defendant had assets. Defendant made no objection for want of such proof, and the case went to the jury, who returned a verdict for the plaintiff on all the issues. Defendant moved for a new trial, because assets had not been shown, and the court offered him a new trial of *that issue alone,* which he declined. *Held,* that having refused the opportunity offered of redress in the only point on which he had a right to complain, he had no cause of appeal to this Court.
2. Defendants were in court on the argument of the rule for a new trial, and though called on to support the ground taken (a want of assets) by affidavit, declined to do so. *Held,* that they were not entitled to a new trial.

ACTION for debt on an obligation under seal, to which the defendant pleaded payment, set-off, fully administered, the acts of 1715 and 1789 in favor of executors, debts of higher dignity, no assets ultra, and retainer. When the suit was called and the jury charged, the (209) defendant's attorney mentioned to the court that he expected a witness to support the plea of the act of 1715, barring actions against executors if not brought within seven years, but that as the witness had not been summoned he was not prepared with the proof. The plaintiff's counsel read the obligation and offered no other evidence. There was no argument on either side, and no charge from the judge. The jury took the case, without any objection on the part of the defendant, retired, and returned a verdict for the plaintiff on all the issues made in the record. The defendant then moved for a rule to show cause why a new trial should not be granted because there was no evidence offered by the plaintiff that the executor had assets to satisfy the plaintiff's debt. There was no affidavit by the executor to show a want of assets, though he was in court, and the want of such affidavit was objected by plaintiff's attorney. After argument the rule was made absolute, on condition that the defendant would waive the plea of the act of 1715, and rely on his other pleas. The defendant refused to accept a new trial on this condition, and there was judgment for the plaintiff and an appeal.

Hogg for plaintiff.

HALL, J. I do not think that the justice of this case requires that a new trial should be granted. If the defendant has no assets subject to the plaintiff's demand, it would be an easy thing for him to set it forth in an affidavit. As he will not do this, we may take it for granted that, although the jury found for the plaintiff without evidence, they did not find against the truth of the case. The object of the defendant seems to be to defeat the plaintiff's claim, not upon the merits, but by the statute of limitation. Under these circumstances, (210) as the plaintiff has a verdict, I am not disposed to deprive him of it. I think the rule for a new trial should be discharged.

HENDERSON, J. The defendant pleaded fully administered and some affirmative pleas. On his affirmative pleas he offered no evidence, and on them the jury found against him. Of this he cannot complain, for he offered no evidence to support the truth of them. But as to his negative plea of fully administered, he had a right to complain, for the jury found against him also upon that plea without evidence, for the proof of assets is by law thrown upon the plaintiff. Anomalous as it may be, the bar must be negatived by the plaintiff, and need not be supported by the defendant; but the principle is right, for assets liable to the plaintiff's recovery is the main pillar of the plaintiff's right of action. More properly, therefore, it forms part of his case, if principle alone were consulted. But the uniform practice, from the earliest times, is to omit to state it in the claim or declaration; and the practice of only requiring that the defendant should intimate the want of assets as sufficient for him, and then that the proof should be thrown on the plaintiff, reconciles the case to principle, in substance and effect. The mode, therefore, is anomalous, to wit, that the disproof of a defendant's plea should be thrown on the plaintiff. And it must have been on this ground that *Lord Mansfield* went when he, to his credit, overruled former decisions and declared that an executor was liable only to the extent of his assets, although he had fully administered and failed to disclose the true state of the assets. The plea was therefore false in part; and if considered strictly as a plea it was the same as if found false *in toto,* upon which grounds prior decisions held the executor liable for the whole debt. But if it is considered that assets in the hands of the defendant is a part of the plaintiff's case, then the defendant is liable so far only as the plaintiff charges him (211) with assets. The want of assets is not, therefore, strictly speaking a plea interposed by the defendant, but rather as a negation of the plaintiff's demand; it is a mere intimation, or more properly a protestation, of the want of assets; which, without such intimation or protestation, would be presumed against him. Of the finding of the jury on this issue, therefore, I say that he had a right to complain. And the court very properly, in that state of the business, offered him a new trial on that issue. This he declined to accept. On what principle, therefore, can his appeal to this Court be sustained? It is quite evident that he wishes more than a bare correction of the error. But in addition to this, although the defendants were in court, they refused to make affidavit of the want of assets when challeneged to do it by the plaintiff. This alone sustains the judgment below. *Wagstaff v. Smith,* 9 N. C., 45.

Let the rule for a new trial be discharged, and judgment affirmed.

The CHIEF JUSTICE concurred.

PER CURIAM. Affirmed.

WILKES v. SLAUGHTER.

If a sheriff give his prisoner the keys of the prison, it is an escape, though the prisoner should not go without the walls.

APPEAL from *Badger, J.,* at BERTIE.

Action of debt against the sheriff of Bertie for permitting one Ryan, a debtor in his custody on execution at the suit of the plaintiff to escape.

The facts were that *Slaughter,* being sheriff of Bertie, by virtue of a *ca. sa.* at the suit of the plaintiff, arrested Ryan on 15 June, 1822, and conveyed him to the common jail. The defendant, after placing Ryan in the jail, delivered to him the key thereof; and Ryan continued in the jail from 15 June until 5 July, having during that period (212) possession of the key, permitting such persons as he thought proper to enter into and depart from the jail, and generally keeping the jail door open, and having it in his power to depart from the jail at his own pleasure. After 5 July, Ryan left the jail, and continued at large until his death in November, 1822.

The defendant, to justify setting his prisoner at large after 5 July, produced from the office of the clerk of the county court of Bertie a paper-writing purporting to be a record of a petition and proceedings in discharge of Ryan on 5 July, as an insolvent debtor, by two of the justices of the peace of Bertie County.

This paper-writing set forth a notice to Wilkes of the intended petition, regularly given, a petition to two of the justices of Bertie praying the benefit of the acts for the relief of insolvent debtors; the command of the justices to the defendant, as sheriff, to bring the prisoner before them, together with the writs which he had against him; the certificate of the justices that Ryan had, in the presence of the plaintiff, taken the oath prescribed for an insolvent debtor, passed in 1773, ch. 4, sec. 3; their order to the defendant for his immediate enlargement, and a schedule signed by Ryan of debts due him.

The presiding judge, *Badger,* instructed the jury that it was, in law, an escape in a sheriff to permit his prisoner to keep the key of the jail and to keep the door open; and that the supposed record did not justify the defendant in setting the prisoner at large after 5 July.

Verdict for plaintiff; new trial refused; judgment, and appeal.

Gaston for appellant.
Hogg contra.

HALL, J. The principal question in this case is whether the (214) sheriff is chargeable with an escape for having given up to Ryan the keys of the jail in which he had lodged him, whereby it was optional with Ryan either to remain in jail or not.

It is said in 3 Co., 44, that every person in jail by process of law is to be kept in *salva et arcta custodia,* in order to compel him the more speedily to pay his debts and make satisfaction to his creditors. And it is stated in the same case that by stat. of West. II, ch, 11, the (215) sheriff may keep them who are in execution in fetters and irons, to the end that they may satisfy their creditors. Lord Coke says that if need require it prisoners may be kept in irons by that statute; but that could not be done by the common law; that imprisonment is intended for safe custody, but not for punishment. Bac. Abr., Escape, B. Co. Lit., 260*a.* It is also laid down in Plowden, 377, that if a woman be jailer, and one imprisoned in the jail marry her, it is an escape in the woman, for the law adjudges the prisoner to be at large; for he cannot be imprisoned but under a keeper, and he cannot be under the custody of his wife; that if the warden of the fleet, who hath his office in fee, die seized, his son and heir being then imprisoned there, and the office descend to him, being in prison, the law will adjudge him to be out of prison, although he has fetters upon him; because he cannot be his own prisoner. So that no man can be lawfully detained in jail without a jailer or keeper.

In *Bartlett v. Wilkes,* 3 Mass., 101-2, *Parsons, C. J.,* says that to allow a prisoner greater liberty than the law permits is an escape. The escape is committed by being out of the legal custody of the sheriff, that if the debtor has a liberty inconsistent with that custody, he cannot be said to remain in legal custody. In *Coleby v. Sampson,* 3 Mass., 310, the coroner arrested one Minot, the deputy jailer, for debt; neither the sheriff nor any other keeper of the jail authorized by him was there to receive him; the coroner left his prisoner there with a copy of the precept. It was adjudged an escape in the sheriff, because he was not there to receive Minot; for Minot, though deputy jailer, could not receive himself; for the prisoner, by being a keeper and having the keys, is no longer restrained of his liberty; that if a sheriff make a prisoner of the jail keeper and give him the keys it is an escape of the sheriff.

In 6 Johnson, 22, it is decided that if a *ca. sa.* on a judgment (216) against a sheriff was delivered to the coroner, who arrested the sheriff and delivered him in jail to the custody of the under sheriff and jailer, and the sheriff immediately after went at large, the coroner was liable for an escape, because the sheriff was committed to the jail of which by law he had the custody, and of which he appoints the keeper.

From these cases it appears clear to my mind that custody implies physical force sufficient to restrain the prisoner from going at large; that when that physical force is removed it is in the eye of the law an escape. No moral obligation can be received as a substitute for it. Although promises may be made, and may be observed, to remain in close jail, the moment compulsion and force are withdrawn there is no legal custody; the prisoner becomes a free agent; there is no longer any imprisonment, and the precept to the sheriff is disobeyed. This is the result of the view I have taken of the case. The other point made it is unnecessary to consider. I think the rule for a new trial should be discharged.

HENDERSON, J. The counsel for the defendant endeavors to distinguish this case from those cited. Where the keeper, a female, married her prisoner, and where the office of keeper devolved on a prisoner who was and remained in fetters; where the coroner delivered the sheriff whom he had arrested to the sheriff's deputy, the jailer, it was deemed an escape in the coroner, because in all these cases there was no keeper, for a prisoner cannot be his own keeper. In the present case he says that the sheriff remained still the keeper, although he gave to the prisoner the keys of the jail; and there being in fact no departure out of the walls of the prison, there was, in law, no escape, and that physical restraint is not necessary; that moral restraint, or what is the same thing, I think, voluntary restraint, is sufficient; and he assimilates this case to one where there is no jail provided by law, (217) or before any jail was pointed out by law as a place of confinement, when the sheriff himself was bound to find a jail, and such jail was weak and insufficient to retain the prisoner, yet the prisoner remained within the walls of the prison, it was deemed not an escape; and he said that the only test of confinment was the remaining within the walls of the prison. I think if this argument is pushed to the proper extent, it will show the incorrectness of the conclusion. There can be no confinement without a keeper, and a prisoner cannot be his own keeper; therefore, if his imprisonment is voluntary, if he is considered as being in confinement, it is under his own keeping, and such confinement is not imprisonment. The cases of the prisoner marrying his keeper, and the office of keeper descending on a person who was and continued in prison and in fetters, show that confinement alone will not do. It must be involuntary confinement, and that under a keeper; for the necessity of there being a keeper shows that confinement from a person's own will is not sufficient. Nor is it material whether this confinement arises from a prospect of benefit, a sense of duty arising from a disposition to submit to the law, or from a promise made to the keeper, or from any other cause than that of physical force. It is true, if the prison is broke open and a prisoner remains in the jail through choice, the sheriff cannot be charged with the escape, for the opening has not been by his consent; he has not abandoned the prisoner to his own will. Nor is this like the case to which it has been compared where the jail was weak and might have been broke from by the prisoner. It was closed and was effectual to the end designed, and an allegation that it was insufficient will not be heard. It is like a legal presumption which cannot be contradicted. How unlike this case. Here is no attempt at confinement or restraint; the remaining in the jail was purely voluntary; the keys were delivered to the prisoner, and he opened and shut the door at his own pleasure.

As *Chief Justice Parsons* says, free agency is inconsistent with (218) imprisonment. It is designed to make dishonest men pay their debts—men who are able, but not willing to do so. Take away the idea of restraint, and you take with it half its bitterness.

TAYLOR, C. J., *dissentiente*: An escape is defined to be a violent or privy evasion out of some lawful restraint; as where a person is arrested or imprisoned, and gets away before delivered by course of law. Stanf. P. C. C., 26. The facts of this case do not bring it within this description of the offense; and if they amount to an escape, an alternative should be added to the definition, "or where the sheriff so indulges the prisoner that he may if he please." The rule of law ought to be very clear which charges the sheriff in a case of this kind. Some well established principle or adjudged case which leaves nothing to inference or remote analogy might have been produced, I should think, if the law had been so understood. But, as it is still doubtful to my mind, though I have taken pains to inform myself, it seems to me safe to follow the advice of Lord Coke, given on this very subject: "And forasmuch as escapes are so penal to sheriffs, the judges of the law have always made such favorable construction as the law will suffer in favor of sheriffs; and to the intent that every one bear his own burden, the judges shall never adjudge one to make an escape by a strict construction." 3 Coke, 44. The cases cited for the plaintiff do not appear to establish the position that the sheriff is liable in this case. In *Boynton's case,* cited 3 Coke, the main points adjudged were that the sheriff is not bound to bring the party arrested on a *ca.* sa. in a right line from the place where he was arrested, or from the county. But if he has the prisoner in court the day of return (having been out of his custody in the mean season), it is good; but if a sheriff assent that one who is in execution and under his custody go out of the jail for a time, and then to return, although he re- (219) turn at the time, it is an escape. And so it is if the sheriff suffer him to go with a bailiff or keeper; for the sheriff ought to have him in close custody. These are cases of an actual going out of the jail, and certainly amount to an escape. But in the same case there is a quotation from Dyer to show that "those who are in execution shall not go at liberty within the prison nor out of the prison with their keepers, but shall be kept in strict ward." This appears in Dyer, 249b, to be an order of the Star Chamber, made in 24 Hen. VIII—a court which, *Lord Clarendon* observed, held for honorable that which pleased and for just that which profited. But, admitting the authority to be good, its utmost extent is to prevent the prisoner from going out of his apartment; and not to restrain him from such indulgence as may be had within his room. So it is stated in Dalton, ch. 159, that to suffer a prisoner to have greater liberty than the law allows is an escape. And this is sometimes quoted without the example by which he explains his meaning, viz., that if a jailer or other officer shall license a prisoner to go abroad for a time, and to come again, this is an escape, though he returned again. *Ibid.* In *Wilkinson v. Salter*, cited from Cases temp. Hard., 310, the evidence of the escape was that the prisoner had been seen at large out of the prison; that the plaintiff's attorney asked the jailer if he was in custody, who told him he was gone out of prison on an errand for the prisoners, and that the jailer had made him turnkey of the prison, so that he had the key in his custody, and let people in and out of the jail. The Court must be understood according to the subject-matter of the case; and, in reference to these facts, when it pronounces the escape to be voluntary, "for, as he has been entrusted with the keys of the prison, he may go out when he will." In the case cited from 5 Mass., 310, the sheriff was held guilty of an escape (220) because he was not at the jail to receive the prisoner, neither had he any deputy there. Besides, the jailer, who was the party arrested, was not put into the jail, but remained in the jail house, viz., the residence of the jailer. The only jail keeper, therefore, was the party arrested; and he could not secure and confine himself. But in this case the sheriff continued to be jailer, and was actually present to fulfill any duty required of him. What is said in the case last cited, that if the sheriff make a jail keeper of the prisoner, and give him the keys, it is the escape of the sheriff, I must think that the Court spoke with a view to the action in *Wilkinson v. Salter*. But in that case there was an actual going out of the jail. There is a plain difference between there being no jail, and a jailer who does not exercise all the power that the law gives him. I cannot, therefore, consider those cases as applicable which show that no one can be lawfully imprisoned without a keeper; as when a woman who was warden of the fleet married one of the prisoners he was adjudged to be at large; so if the office of warden of the fleet descend upon a prisoner, the law will adjudge him to be out of prison, because he cannot be his own prisoner. It seems to me a prisoner continues within the legal custody of the jailer while he remains within the prison and there is an existing jailer. The opposite construction would amount to this: that the physical power of escaping shall be equivalent to an actual escape. And if the jail be insufficient, the sheriff may not take the risk upon himself, but shall fetter the prisoner or summon a guard. That, although the actual restraint has been found ineffectual to keep the prisoner in jail, yet the sheriff shall pay the debt because there was a possibility of escaping. In what respect does it differ from the case where a feeble sheriff arrest a strong man upon a writ, who goes quietly to jail without external force; yet, as he might have escaped by a single effort, the sheriff shall be considered as having suffered an escape. Admitting that upon general princi- (221) ples the design of imprisonment is to enforce a man to pay his debts, yet it does not mean that the law requires anything more than confinement of the person under legal custody. In the case cited from 1 Bos. & Pull., 24, it was held that if a sheriff or other officer, having taken a prisoner in execution, permit him to go about with a follower of his before he takes him to prison, it is an escape; because the follower could have no power to detain the prisoner if he had chosen to escape; and the warrant would have been no justification to him if any mischief had happened. But I cannot doubt that the sheriff might have interfered in this case to prevent an actual escape, if the attempt had been made, any more than I can doubt that a sheriff who is conducting a prisoner to jail may exert himself to prevent an escape, although he is walking with him without any restraint on his person. The law introducing executions against persons for debt was passed nearly six centuries ago, and provides "that they shall be imprisoned in iron under safe custody." Stat. West., 2. In construing this law it is allowable to take into view the different genius of our institutions and age, the language of the Legislature whilst that law was in force, and the alterations of policy which have recently taken place; and, although it may not be practically true in the extent laid down by a great moralist, "that as names make laws, manners likewise repeal them," yet the consideration of these things will somtimes aid in the intrepretation of them "and give them a meaning, not according to the letter, that kills, but according to the spirit, that giveth life." It is accordingly provided that the apartments of a jail shall be comfortable, that prisoners shall not be treated with wanton or unnecessary rigor, and that they may be allowed to procure such additional comforts as their circumstances allow. 1795, ch. 433. The question whether there has been an escape (222) or not is of easy solution where it depends upon the fact whether the prisoner remained in or went out of prison; but to make it depend upon the degree of indulgence which is shown to him while he actually remains in prison is to render the application of the law difficult and uncertain.

Cited: Currie v. Worthy, 47 N. C., 107.

BRITTAIN v. ISRAEL AND OTHERS.

When the purchaser of a slave has at the time of his purchase as full knowledge of a defect in the slave as the seller has, no matter how he obtained his knowledge, he cannot afterwards recover for such defect.

ACTION on the case for a deceit in the sale of a negro, tried before *Badger, J.*, at BUNCOMBE.

The negro in question had been sold by the defendants at public sale without any warranty of soundness, and without disclosure of any defects. The only question made below on the evidence was whether the plaintiff had a knowledge of the negro's situation when he purchased him; and on this point a witness swore positively that he had informed the plaintiff of the defect in the negro before he purchased.

The court instructed the jury that if the plaintiff at the time he purchased had a full knowledge of the unsoundness of the slave as that possessed by the defendants he was not entitled to recover. The jury found a verdict for the defendants, and, a new trial having been refused, from the judgment rendered plaintiff appealed.

TAYLOR, C. J. This action is built upon the allegation that the seller committed a fraud in the sale of property which he knew to be (223) diseased without disclosing the defect to the buyer; it being probable that if he had made such disclosure the latter would not have purchased at all, or at least at the price he actually paid. The material charge in all the precedents of declarations in this action is that the defendant falsely and fraudulently deceived the plaintiff in the sale, whereby he lost and was deprived of all the benefit and advantage which he might and otherwise would have derived and acquired from the sale. Now, this cannot be predicated of a person to whom the defect was as well known as to the seller; it cannot be affirmed with truth that he was deceived, or that he suffered a loss by the fraudulent concealment of the other party; for, having knowledge of the defect, it must be presumed that he bid so much the less. If he has been injured by the purchase, he willingly received the injury with his eyes open, nor can he justly claim compensation from any one.

The principle is well established in relation to this kind of action, both in the sale of chattels and real property; for, although every one must admit the immorality of concealing the defect from the purchaser in the expectation of unworthy gain, yet a person buying with full knowledge can only complain of the intention of the seller, but not of his acts. Thus it is laid down that an action of deceit does not lie against him who sells without warranty if the thing sold had a visible malady which the vendee had an opportunity of discovering; as if a man sell a horse that he knew to be lame, or had any defect which the vendee might perceive by inspection; or if he sell corrupted wine, and the vendee taste and approve it. 1 Com. Dig., 170. Nor is it essential in every case that the buyer should actually know of the defect; for in things of a certain value, if the buyer has it in his power to inform himself of the true value, and neglects it, he cannot maintain the action; as if a man, wishing to sell a house, asserts that another person would give so much for it, whereas he had not made any offer, the action will not lie, because the buyer might (224) by inquiring have informed himself of the truth. Ld. Raym, 1118.

The same rule seems to be applicable to sales equally, whether there be warranty or not; for with the single exception of a horse warranted sound, and he wants the sight of an eye, the discovery of which seems to be a matter of skill, a warranty does not bind if it be false in the view or knowledge of the vendee; as if cloth be warranted of one color and it is of another, and the vendee sees it. 1 Com. Dig., 168.

A further extension of the principle has applied it to cases where the plaintiff sustains a positive damage by the false and fraudulent assertion of the defendant; yet as the falsehood might have been detected by the exercise of ordinary diligence, and all injury averted, it was held that he could not maintain the action; as where the agreement was to carry goods at so much the hundredweight, and the defendant affirmed they weighed much less than in fact they did, whereby the plaintiff was induced to carry them and lost his horses in the attempt; but it was held the action would not lie, since it was negligence in the plaintiff not to weigh the goods. Cro. Jac., 387.

All this is perfectly conformable to the dictates of rational equity; and we find the writers on general law inculcating the rule to the same extent in which it is enforced by our municipal law. Thus it is stated in Puffendorf that, as to faults already known to the buyer, it is not necessary for the seller to repeat them, for when the knowledge is equal on both sides the parties stand on the same footing in view of justice. Lib. 5, ch. 3, sec. 5.

I am consequently of opinion that the knowledge of the plaintiff as to the imperfection of the property was properly submitted to the jury; and having been affirmed by them, justified a finding for (225) the defendant.

HALL, J. I think in this case the charge of the judge was right, "that if the plaintiff at the time of the purchase had a full knowledge of the unsoundness of the slave as that possessed by the defendants he was not entitled to recover." Certainly it was immaterial how he became possessed of that knowledge. It is not our duty to inquire whether he possessed it or not; the jury, the proper tribunal, has decided it. I think the judgment of the Superior Court must be affirmed.

HENDERSON, J. The law cannot be more correctly or perspicuously stated than in the judge's charge; for the gist of the action is that the purchaser was cheated and imposed on by the fraud of the seller. When the defect was known to the purchaser, no matter from what source he derived his information, he is not cheated; and some elementary writers go so far as to say that even where there is an express warranty of soundness, if the unsoundness was apparent, and, therefore, must have been known to the purchaser, that no action shall lie; not for the reason given by *Chief Justice Blackstone,* that palpable defects are presumed not to be within the warranty, but because the warranty, being substituted for an actual examination of the property by the purchaser, that he may thereby ascertain its condition and quality, it is confined in its character to those defects which are unknown to the purchaser; for as to those defects which are already known an examination is unnecessary. But be this as it may, no action can be supported on the ground of being imposed on and cheated in cases where there is no express warranty, when the purchaser knew as much of the defect as the seller; and the facts being fairly left to the jury, the rule for a new trial must be discharged.

(226)

THE GOVERNOR TO THE USE OF SHACKELFORD v. ADMINISTRATORS OF M'REA AND OTHERS.—From Craven.

A writ issuing to one county from the Superior Court of another county must have the seal of the court from which it issues impressed on it.

ACTION of debt against the representative of a deceased sheriff and his securities, in which the jury found a verdict for the plaintiff, subject to the opinion of the court upon the following point: A writ, but *without the seal of the court,* issued from the Superior Court of Craven to the sheriff of Cumberland, returnable to said court, on which the sheriff indorsed, "Too late to hand." The writ did not come too late to hand; and it is submitted whether said writ, so unsealed and so issued, is one on which the sheriff is in law liable for neglect in executing or making an untrue return thereon; if it be, then judgment to be rendered for the plaintiff; if otherwise, the plaintiff to be nonsuited.

The court below gave judgment for the plaintiff, and the defendant appealed therefrom to this Court.

Gaston for appellant.
Hawks for appellee.

TAYLOR, C. J. This question seems to be decided by the acts referred to. Dispensing with a seal where a writ issues to a county within the district is a strong legislative declaration that a seal is essential where a writ issues out of the district. It might be supposed that the signature of the clerk was sufficient proof of its authenticity in all the counties where courts were subordinate to the district Superior Courts, but not so well known beyond their limits. Probably since the alteration of the courts the same reasoning would render it necessary to add the seal to all writs issuing out of the county, since the counties now bear the same judicial relation to each other as the districts formerly did. (227) A process by which a man's person or property is liable to be affected ought to bear on its face the highest evidence of authenticity; and the law has always considered that the writs issuing from a court are most satisfactorily proved by the seal provided by public authority, which every man is presumed to know. A seal of some sort has been indispensable to all original writs from the earliest times; and though the Legislature has in some instances relaxed the common-law strictness of affixing them to all writs, they have assented and preserved the necessity of it in this case. My opinion is that the sheriff is not liable.

HALL, J. By Laws 1791, ch. 344, the Governor is authorized and required to procure seals for the courts of record within the State. By Laws 1797, ch. 474, it is declared not to be necessary that the clerks of any district court should affix the seal of the court to process that issued to any county within the district, or that the clerk of any county court should affix the seal of his court to any process that issued to the county of the court of which he was clerk. Before these provisions, no doubt, it was the duty of the several clerks to affix their seals to all process that they issued. The duty of the clerk in the case in question was to affix his seal to the writ; it was not dispensed with by the act of 1797. The act of 1806, ch. 694, sec. 5, makes provision for seals for the present Superior Courts; if there was no seal of the Superior Court from which the writ issued, that should be made to appear. I think the judgment should be set aside and a nonsuit entered.

HENDERSON, J., was of this opinion also.

PER CURIAM. Reversed.

Cited: *Shepherd v. Lane,* 13 N. C., 154; *Taylor v. Taylor,* 83 N. C., 118; *Henderson v. Graham,* 84 N. C., 1.

(228)

WORKE v. BYERS.—From Cabarrus.

1. When a party plaintiff voluntarily goes into court and enters on the record that he is *nonsuit*, it is not a nonsuit, but a *retraxit*, and plaintiff cannot appeal thereon.
2. In proceedings under a statute, in the nature of penal actions, by warrant before a magistrate, *e. g.*, turning a road, the warrant must refer to the statute in such a manner that defendant may certainly know what he is called to answer.

THIS was a suit for a penalty originally by warrant before a magistrate, to which it was alleged the defendant had subjected himself by turning a public road. The warrant charged the defendant with "altering and changing, and stopping or shutting up the old road, in his, (said Byers') land, near the natural bridge branch on the public road from Statesville to Torrence's, contrary to law." In the trial before *Nash, J.*, it was proved, among other matters, that the public road at the natural bridge branch was not obstructed, but that the defendant's fence complained of was between 50 and 100 yards from the branch where the road crossed it.

On this part of the case the jury was informed that as the plaintiff had given to the obstruction of which he complained a particular location, he must prove it to exist as charged in his warrant, and that the proof was matter of fact to be judged of by them. The jury found a verdict for the defendant, and a new trial having been refused, the plaintiff appealed.

J. Martin for defendant.

(230) TAYLOR, C. J. The eight cases between these parties are brought to recover penalties for the obstruction of a public road; the same obstruction having been continued for a considerable period, and the penalties claimed being at the rate of £5 per month. In four of the suits the plaintiff entered a nonsuit in the county court, and then immediately appealed from the judgment; and the prior question is as to the regularity of this practice. According to the principle on which a nonsuit is founded, it supposes an absence and default in the plaintiff, and that he does not pursue or follow his remedy as he ought to do; and thereupon a nonsuit, or *non prosequitur*, is entered, and he is said to be nonsuit; and for this he was at common law liable to an amercement. It may be assimilated on the part of the plaintiff to a judgment by default on the part of the defendant. Thus, when a jury are ready to deliver their verdict, the plaintiff is bound to appear in court in person or by his attorney; otherwise, it cannot be given, and he, the plaintiff,

becomes nonsuit; and there seems to be no way in which a nonsuit can be voluntarily suffered unless the plaintiff withdraw himself or fail to answer when called, so essentially does the idea of omission or neglect enter into it. 3 Bl. Com., 296, 316, 376. And this description of a nonsuit is confirmed by the mode of entering up the judgment, "Upon which the said A., being solemnly called, doth not come, nor further, prosecute his bill against the said B.; therefore," etc. 2 Lilly, 508. Although the record states that the plaintiff went into court and suffered a nonsuit, yet calling it so cannot make it a nonsuit against the nature and name of the thing. It comes, however, precisely within the description and character of a *retraxit* as given in the books. If the plaintiff says he will not sue, this is a *retraxit;* but if he says he will not appeal, this is not a *retraxit,* but a nonsuit. A *retraxit* cannot be, (231) unless the plaintiff or defendant be in court in proper person. 2 Danvers, 471; 8 Co., 58. Lord Coke also enters into a particular consideration of the difference between a nonsuit and a *retraxit* in his commentary upon Littleton, the substance of which is that a nonsuit is error after demand made, when the demandant or plaintiff should appear, and he makes a default. A *retraxit* is error when the demandant or plaintiff is present in court. Co. Lit., 139a. To the same effect is Mr. Justice Blackstone: A *retraxit* differs from a nonsuit in that the one is negative and the other positive. The nonsuit is a mere default and neglect of the plaintiff, and, therefore, he is bound to bring his suit again upon payment of cost; but a *retraxit* is an open and voluntary renunciation of his suit in court, and by this he forever loses his action. If any other proof is necessary of the nature and effect of a *retraxit,* it will appear in the mode of entering up the judgment: "The said A. B. came into court in his own proper person and confessed that he would not further prosecute his said suit against the said C. D., but from the same altogether withdrew himself." 3 Chitty, 477. It seems impossible from the authorities to consider the act done by the plaintiff in this case in any other light than a voluntary renunciation of his suit, and operating, according to the plain dictates of justice and law, as an impediment to any further prosecution of his action. In the rest of the cases there is a fatal defect appearing on the face of the warrants in their omitting to state that the offense was committed against the act of Assembly. It is not a formal but a substantial rule that requires a party who sues upon a penal statute to apprise the adversary by some general reference that he is sued for violating the statute. When a person is sued for a penalty on a statute it is necessary to rehearse the special matter and say that the action is brought against the form of the statute; (232) otherwise, if it be not a penal offense at common law, the court will not look to see if it be an offense by statute, and the defendant has no right to suppose that he is sued otherwise than at common law. He may thus be prevented from making a due defense, which, perhaps the law, if he were referred to it, would enable him to make. Saying that he obstructed the road contrary to law gives him no information; he would naturally inquire, What law, statute or common? A long train of decisions has established the principle, and much as we incline to give a liberal construction to proceedings before magistrates, this is an objection that cannot be surmounted. The case is not to be distinguished from *Scroter v. Harrington,* 8 N. C., 192. One of the warrants concludes properly, and might be supported were it not affected by the other objection. The Court is of opinion that there must be judgment for the defendant in all the cases.

Cited: Wharton v. Comrs., 82 N. C., 15.

CHAMBERS AND OTHERS v. CHAMBERS.

If one tenant in common of lands take the whole profits thereof, the other cannot maintain case for his part.

ASSUMPSIT for use and occupation, of money had and received, and the case came on to be heard before *Badger, J.,* at IREDELL, upon the following facts, stated by the parties as a case agreed:

The plaintiffs and defendant, being tenants in common of a messuage and tract of land, the defendant took possession of it and received the whole profits. There was no lease. The defendant was not in possession as a tenant under the plaintiffs of their undivided share, nor was there any express promise on the part of the defendant to pay. This (233) action is brought to recover the plaintiff's share of the profits so received by the defendant; and if the court shall be of opinion that the plaintiffs are entitled in this form of action to recover the same, then a judgment is to be entered for the plaintiff for $29.10, with interest thereon, etc.; and if the court shall be of a contrary opinion, a nonsuit is to be entered. The presiding judge being of opinion that the action could not be supported, directed a nonsuit, and plaintiff appealed to this Court.

TAYLOR, C. J. It has been held that if two were jointly possessed of a horse, and one of them sell him, an action of account will lie against him for his share of the money; and it has been thought that an action on the case for money had and received might also be brought; because, by the sale and turning the thing into money, the joint interest was gone, and each had a separate interest for a sum certain. Willes, 209. But when one tenant in common secured the rents and profits of a real estate, the other could not bring an action of account against him at common law, unless the latter were appointed bailiff. This is remedied in England by the statute of Anne, which, however, has not, I believe, been evtended by construction to an action on the case. In this State the law remains as it was when Lord Coke wrote: "Albeit one tenant in common take the whole profits, the other has no remedy by law against him, for the taking of the whole profits is no ejectment." Co. Lit., 199b.

HALL, J. I concur in the opinion with the judge below, that the present action cannot be supported. By the common law joint tenants and tenants in common had no remedy against each other where one alone received the whole profits of the estate, for he could not be charged as bailiff or receiver to his companion. Co. Litt., 172a; 186a; 200b. By 4 and 5 Anne, ch. 16, the action of account is given in such cases; but the statute for that purpose is not in force here. If it was (234) it would afford no support for the present action. If there had been an express promise, the case would be different; but the law will not imply one. Bac. Abr., "Assumpsit," A. In case of an ouster by one tenant in common, after judgment for the other in ejectment, trespass would lie for the mesme profits, 3 Wils., 118; but I think there can be no authority found in support of this action. The case is a hard one, but it is not in our power to alter the law. I, therefore, think judgment must be given for the defendant.

HENDERSON, J., was of the same opinion.

COMMISSIONERS OF RALEIGH TO THE USE OF BOND v. HOLLOWAY AND OTHERS.

When an act of Assembly gives to an auctioneer an *exclusive* right of selling goods at auction except in particular cases, the law, independent of any contract between the parties, imposes on the auctioneer as an *official* duty that he shall pay over to his employer the proceeds of the sale; and, therefore, it was held, that the auctioneer and his securities were liable on the auctioneer's official bond when he had failed to pay over to his employer, for a breach of that part of the condition which bound the auctioneer to do and permit all and whatsoever *the law required.*

APPEAL from *Daniel, J.*, at WAKE.

Debt on a bond, with condition, as follows:

"STATE OF NORTH CAROLINA, CITY OF RALEIGH:

"Know all men by these presents, that we, Kenneth Gillis, John Holloway, Lewis Yancy, and James Mears, all of the city of Raleigh, are held and firmly bound unto the commissioners of said city, and to their successors in office, in the sum of £5,000, to which payment well (235) and truly to be made, etc.

"The condition of the above obligation is such that whereas the above bounden Kenneth Gillis was, on 7 August, 1818, appointed to act as auctioneer in said city, if, therefore, the said Kenneth Gillis shall well, truly, and faithfully account for and pay to the said commissioners or their successors in office, from time to time, and on such days as may be appointed for that purpose by said commissioners, 1 per centum on the total amount of sales which shall have been made by him, and for which he is liable by law as auctioneer as aforesaid, and shall moreover do and permit all and whatsoever the law requires of him as such auctioneer as aforesaid, then the above obligation to be void; otherwise, to remain in full force and virtue."

THE writ in this case was "to answer Henry Potter, William Hill, Joseph Gales, Samuel Goodwynn, John Holloway, Benjamin S. King, and David Royster, commissioners of the city of Raleigh, and their successors in office, of a plea," etc.

The breach assigned was that goods had been delivered to Gillis to sell at auction, by Southy Bond, and that he had sold them and failed to pay over the proceeds. The defendant pleaded the general issue, conditions performed, conditions not broken; and on the trial below, before *Daniel, J.*, the plaintiffs introduced a witness who swore he delivered the goods in question, and that upon application to the auctioneer for the proceeds he returned a portion of them and alleged that *they* could not be sold to advantage. The action was to recover the value of those not returned.

On the trial the defendants exhibited the printed act of Assembly, by which the corporation of the city of Raleigh is styled "the commissioners of the city of Raleigh," and objected that the bond was void, or at least could not be given in evidence on the trial of this suit. It was further objected that the plaintiffs should show that at the time of suing out this writ, or at the time of signing the bond, those named in the writ were commissioners. Upon these objections the court determined against the defendants, and left it to the jury to determine whether, (236) from the evidence, the goods not returned were sold by the auctioneer, and directed them that if they should be of opinion they were sold and not accounted for, they should find for the plaintiffs according to their value.

Verdict for plaintiffs; new trial refused; judgment, and appeal.

Seawell for plaintiff.
Hawks and Haywood contra.

HENDERSON, J. Gillis, the auctioneer for whom the defendants are securities, was appointed under the act of 1806, authorizing the city of Raleigh and the several towns therein mentioned to appoint auctioneers; and the question is whether the words that he, Gillis, *shall do and perform all that the law requires* (the obligatory words of his official bond) bind him to account with and pay to the owner the proceeds of goods by him sold as an auctioneer. There is nowhere to be found in the act any express words by which such duty is imposed; all that is said in relation to the proceeds of the sales made by the auctioneer is that part which gives the summary remedy to the owner against the auctioneer, neither the words nor spirit of which extend to the securities. The only duties imposed on him in express terms are that he shall render an account to the commissioners of his sales, pay to them 1 per centum thereon, and submit his accounts to them and to others interested therein. But as the act gives to him the exclusive right of selling goods at auction, except in particular cases (within any of which exceptions this case does not fall), I think that *the law*, and not the mere *contract* of the party, imposes on him the obligation to account with and pay to the plaintiff the proceeds of the sale, for the law takes from the plaintiff the right and power of exercising his own judgment in the selection of an agent, and appoints one to act for him; it is, therefore, reasonable that the *law* should impose on the agent one of the most obvious and necessary duties arising out of his situation as agent, and without (237) which no private agent would ever be employed. And this obligation, to wit, that the agent should render to his principal the proceeds of his principal's property by him sold, is raised without any words or promise to that effect; it arises from their *relation*, and without which no such relation would be created by individuals. It is not, I think, a strained interpretation of the law to say that this obligation is imposed by the law; that it exists independently of any contract of the parties, either express or implied.

It may be observed against this argument that Bond could have sold the goods himself, they being his own, without violating the act. To this it may be answered that he *chose* to do it by an agent; and as the law restrained him from making his own selection, it is not unreasonable that this official agent should be held liable on official responsibility.

This construction is very much aided by the large penalty (£5,000) in which the Legislature directs the auctioneer to be bound, a sum much exceeding the 1 per centum duty from sales at auction in all the towns mentioned in the act. I think that there should be judgment for the plaintiff.

The rest of the Court concurred.

PER CURIAM. No error.

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(238)

COUNTY COURT OF RANDOLPH v. JOHNSON.

A county attorney is not entitled to have a fee taxed for his benefit on a *scire facias* issued to a guardian under the Act of 1820.

APPEAL from *Norwood, J.*, at RANDOLPH.

THE defendant had been appointed guardian to an infant of Randolph by the county court, and failed ot renew his guardian bond pursuant to act of Assembly; whereupon a notice issued to him to appear and show cause wherefore he had not done so. On the return of this notice the county court dismissed the proceedings at the defendant's cost, and in the bill of costs a fee of $4 was taxed for the county attorney. This was a motion to amend the taxation of costs by striking out the fee for the attorney; and was presented to this Court on the appeal of the defendant from the refusal of *Norwood, J.*, to amend the taxation as moved for.

HALL, J. The act which passed in the year 1816, Rev., ch. 905, directs that the clerks of the county courts shall issue summons, *ex officio,* against all guardians who shall fail to appear and exhibit their accounts at the times required by law, and for such service shall be entitled to 60 cents; and the act passed in 1820, Rev., ch. 1039, directs notice to be given by way of *scire facias* to guardians who have failed to renew their bonds as the law requires; but no provision is made in either of these acts for either employing the State's attorney or taxing a fee for his use; neither is any such provision made in the act of 1762, Rev., ch. 69, where the duty of guardians is fully prescribed and pointed out; nor can I find any provision for such taxation in any other law. I am, therefore, compelled to say that judgment should be entered for the appellant.

PER CURIAM. Reversed.

(239)

GORDON v. FINLAY.

1. A purchase from one administrator, where there is more than one, will vest no title in the purchaser; *aliter* of executors.
2. A trustee cannot become a purchaser at his own sale, and it would seem that no circumstances will justify a departure from this rule.
3. When one administrator purchases a slave of his coadministrator it is not, in strictness, a purchase *from himself;* but the purchase vests no title, for duty and interest being in opposition in the purchaser, the case comes within the mischief intended to be guarded against by the rule which prohibits trustees from purchasing of themselves.

DETINUE for a slave, tried before *Badger, J.,* at WILKES.

On the trial it appeared that the slave in question belonged to one Gordon, who died in 1806 intestate; administration on his estate was granted to the plaintiff, his widow, and Wesley Gordon, his son, and one of the distributees. It having been ascertained that there were debts due from the estate more than ordinary perishable property would pay, it was agreed in 1807 between the plaintiff on the one part and Wesley Gordon and his brothers and sisters (the other distributees) on the other, that if the plaintiff, their mother, would pay those debts, supposed to be of amount equal to the value of the slave in question, she might keep the slave as her own property. At the time of this agreement two of the distributees were infants. Mrs. Gordon, the plaintiff, accordingly took possession of the slave and kept it until 1811, always claiming him as her own. The estate was settled and the distributees paid, and no objection has ever been set up by the infants, though since of full age, nor has any dissatisfaction been expressed by them. The plaintiff made arrangements for the payment of the debts above mentioned, and evidence was offered to show the fact of payment, which was denied by defendant.

In 1811 the slave went into possession of the defendant under a (240) pledge or mortgage from the plaintiff to secure the payment of $200 to the defendant. Afterwards Wesley Gordon paid defendant, redeemed the pledge, and took possession of the negro. Wesley Gordon then executed to his mother, the plaintiff, a writing declaring that he held the negro as a security for the money he had paid, and that plaintiff was at liberty, by repayment to him, to redeem at any time within five years. In 1817 the plaintiff did pay to Wesley Gordon what was due for the negro, and he was delivered to her by Wesley. During the same year Wesley again obtained possession of the negro, and sold him to defendant to discharge a debt which he had contracted with defendant.

On these facts defendant contended that the payment of debts to the value of the slave by the administratrix, with the consent of all the distributees, would not give a title to the slave; and that the defendant, having purchased from a coadministrator, had good title.

The judge, leaving to the jury the question of fact whether there had been such a payment as was alleged, instructed them that an advance by an executor or administrator of money in the payment of debts to the value of a particular chattel, with the consent and upon the express agreement to the distributees that on such payment the chattel should belong to the administrator or executor, would make such chattel his own. And the jury was further instructed that, after receiving the negro as plaintiff's property, by way of mortgage or pledge to secure a debt, by parting with the negro to Wesley Gordon on receiving the sum due, and Wesley holding him (as defendant did) by way of pledge for the payment of the money, and surrendering the negro to plaintiff upon such payment, that both Wesley and the defendant had admitted that she had title at that time, and were estopped now to deny it.

(241) Verdict for plaintiff; new trial refused; judgment, and appeal.

HALL, J. Although I think the defendant has no right to the negro in question, I think the plaintiff has no right to recover in her individual name, because she does not show a right to the negro in that character. Perhaps if the negro had been taken out of her possession by the defendant, she might have maintained an action for him without naming herself administratrix. Godolph, 134; Wentw. Off. of Ex., 104. But this was not the case. The contract recited, under which she claims the negro, was entered into only by her and *some* only of the distributees; the others at the time were under age. It does not appear that they had arrived at maturity when the estate was settled; and although they have expressed no dissatisfaction at the contract, it does not appear that they have confirmed it, or how long they have acquiesced under it. If they have ratified it, I see no reason why the plaintiff should not recover. If it has not been ratified, a recovery may be effected by the representatives of the intestate in their representative character. If one of them refuses to sue, he may be summoned and severed. Bac. Abr., Exr. and Admr., D. 3. But, under the circumstances of the case, I think the rule for a new trial should be made absolute.

HENDERSON, J. The defendant's title is certainly bad, for he derives it from one of two administrators, who sold in satisfaction of his own *private* debt and at private sale. I think, also, that the plaintiff has no title, nor do I think that the defendant is estopped from showing it. The plaintiff claims the negro in question by virtue of an agreement between her and her coadministrator, Wesley Gordon, which was that she was to pay certain debts of the estate, supposed to be equal in amount to the value of the negro, and take the negro as her own property; and this agreement was made with the consent of such of the distributees as were of age. That a settlement was afterwards made (242) of the estate (but when it does not appear) that the distributees are all now of age, and have never questioned the settlement (neither does it appear when they came of age). In all sales there must be a vendor and vendee. The same person cannot be both vendor and vendee. The purchase, then, was made of Wesley Gordon alone, and one administrator cannot alone, when there are more, make a sale. They are in this respect unlike executors, for all the administrators together represent the intestate, whereas each executor represents the testator. But there is something further in this case. The estate was confided to the plaintiff with the administrator. She was bound to exercise her best judgment in its management, and no act of hers could be valid where her duty and interest were in opposition. In the sale of this negro it was her duty to obtain the best price (at least his value); it was to her interest, if she became the purchaser, that she should obtain him on the lowest possible terms. Nor is it an answer to show that in this particular case the full value was paid. For wise purposes the rule of law is general and makes no exceptions. A trustee cannot purchase at his own sale, that is, of himself. This rule may at times produce individual hardships and inconveniences, but its general operation is beneficial. "Lead us not into temptation" came from the lips of Him to whom error cannot be imputed. To implore it would not disgrace the most honest and pious among us. To make exceptions from the rule in particular cases, upon the ground that full value was paid would produce litigation; and who is there to show the full value? Mere strangers to the worth of the property, and on the opposite side, one whose situation gives him an opportunity of knowing all its defects, and also all its good qualities and where interest would lead him to expose the one and conceal the other. I, therefore, think that the rule should not be departed from; I will not say in any instance, but I must say in (243) those which I at present can call to mind. I am released from saying anything about the ratification by the distributees. To prevent discussion I will confine myself to those who were under age, for it is not as to them shown what they have done or said, or whether they have said or done anything knowingly. It appears only that they have not disturbed the settlement; for how long a time does not appear. What does appear may all well be, and the sale will not be confirmed or made good. Nor is the defendant estopped from showing title paramount the plaintiff's; allowing that he was prevented from doing this during the mortgage, the estoppel arose from the mortgage and expired with it. I admit that possession alone will support an action, founded even on the title against a mere wrongdoer, until a title paramount is shown to be somewhere; for possession of a chattel is *prima facie evidence* of title; as in this case, if Mrs. Gordon had shown that she had been in possession of the slave, claiming him as her own, and that the defendant now has him, and he shows no title, Mrs. Gordon would recover, for her possession is *prima facie* evidence of her right; but when the defendant shows that it was Gordon's in his lifetime, which was prior to Mrs. Gordon's possession, she must then show a title in herself, for her title, supported by *prima facie* evidence alone, is destroyed. It is asked, How is this title in the administrators in their representative capacity to be enforced? I answer, by an action in their representative capacity, in which they both must join; at least the names of both are to be used in the commencement, and if one will not go on with the action, such one must be summoned and severed.

I believe all the assertions made in this opinion are to be found in the commonplace books, and therefore I have not cited authorities. As to the authority of one administrator, where there are more than (244) one, I would refer to *Mangum v. Sims,* 4 N. C., 160.

TAYLOR, C. J., concurred with his brethren.

PER CURIAM. New trial.

Cited: McLeod v. McCall, 48 N. C., 89; *Froneberger v. Lewis,* 79 N. C., 428; *Dickson v. Crawley,* 112 N. C., 632; *Jordan v. Spiers,* 113 N. C., 346.

JOHN ANDERSON & CO. v. HUNT.—From Franklin.

PER CURIAM. This being a case wherein satisfactory evidence has been adduced to the Court that it was the design of the judge who tried it to make up a statement to be transmitted to this Court, which from some cause or other has been omitted, there must of necessity, be a new trial. *Hamilton v. McCulloch,* 9 N. C., 29.

New trial.

HART v. LANIER.—From Franklin.

When the sheriff returns to a writ of *capias ad respondendum* that the defendant broke custody before he reached the jail, he cannot be proceeded against as *bail;* for sheriffs are not by law compelled to be special bail against their consent, and here the return shows that the sheriff did not mean to be bail.

SCI. FA. to charge the defendant as special bail of one Freeman Downs. At the time of the service of the writ, which the plaintiff issued against Downs, the defendant was sheriff of Franklin. The writ was returned by the defendant to Franklin County court, September Term, 1819, indorsed, "Executed, and broke custody before got to jail"; signed by the defendant as sheriff. The plaintiff offered the record of the judgment in evidence, and the court on inspection adjudged that the defendant is not liable as bail, that there is no record of such liability, and gave judgment accordingly, with costs, and (245) from this judgment there was an appeal.

TAYLOR, C. J. The act specifies two cases wherein the sheriffs shall be chargeable as special bail; one is where he returns no bail; the other, where the bail returned is held insufficient, then upon exception taken to it, and notice to the sheriff, he shall be liable. When a sheriff suffers the party to go at large without bail, he is not liable to an action for an escape, provided he have him on the return of the writ; but if he have him not then, or afterwards suffers him to go at large without proper authority, he is liable to an action. This is the law of England, because no provision is made there for the sheriff's becoming bail; but according to our law, if the sheriff suffer the party to go at large, he is not liable to an action for an escape, although he have not the body on the return of the writ, but must be proceeded against as special bail, in which case he may make a surrender at any time before final judgment. When the defendant is arrested, and escapes on the way to prison, it evidently was not the intent of the sheriff to make himself liable as bail; he meant to secure the body, and every presumption of his becoming bail is excluded by the fact that the escape was against his will. Whether the escape was made under such circumstances as would amount to a rescue, either by the party himself or others, for which the sheriff would not be liable on mesne process, it is not now in question, the only inquiry being whether, when he returns an escape, he can be proceeded against as bail. I am of opinion he cannot.

HALL, J. The act of 1777, ch. 115, sec. 16, does not impose it upon sheriffs to become special bail against their consent, and in this case the sheriff has not elected to become bail; so far from it that he was about to put Downs in jail for want of bail when he broke custody. He becomes bail when he lets his prisoner go at large without taking bail at (246) all, or without taking sufficient bail, and exception is taken for that cause at the court to which the writ is returnable. But this is neither of those cases, and therefore cannot be within the act of Assembly. Of course, the sheriff cannot be subjected as bail by this *scire facias.* It has been said that if the sheriff is not considered as bail, but subject to an action for the escape, he loses the benefit of making a surrender. 2 N. C., 224. That is true, if he would be liable for the whole of the plaintiff's debt in an action for the escape; but that may not be the case. The jury in such action will be governed by circumstances. Suppose, for instance, it should be proved that the defendant who escaped was insolvent; it would, no doubt, influence the jury in making up their verdict. From this view of the case, I think the judgment should be entered for the defendant. *Tutor v. Sheriff,* 2 N. C., 485.

And of this opinion was Judge HENDERSON.

PER CURIAM. Affirmed.

HILLIARD BY HIS GUARDIAN v. DORTCH AND OTHERS.

When a slave is hired, and is killed during the period for which he was hired, *case* for damages against the person killing is the proper remedy for the owner.

CASE brought to recover damages for killing a slave. Appeal from *Paxton, J.,* at NASH.

The slave had been hired by the guardian of the plaintiff for the year within which he was killed, to some other person. Much evidence was introduced as to the fact of killing, and the plaintiff then proved that the negro had been part of the estate of John Hilliard, deceased, (247) and offered in evidence the record of Nash County court appointing in 1818 a guardian to the children of John Hilliard, who had been dead eight or ten years. The hiring by the guardian was proved.

Paxton, J., who presided, charged the jury that it was for them to inquire, in the first place, whether it was proved to their satisfaction that the negro was delivered over to the guardian of the plaintiff; if so, their next inquiry would be whether the negro was destroyed by the acts, or in consequence of the acts, of the defendants; that if the evidence satisfied them that such was the fact, the plaintiff was entitled to recover, nothwithstanding the negro was at the time hired to a third person who was entitled to the possession and services of the negro; that the plaintiff had a reversionary interest in him, and consequently could support this action against any one who did him a permanent injury.

The proof as to the killing was that it was occasioned by the exercise of immoderate force.

The jury found a verdict for the plaintiff; and the case now stood before this Court on a rule to show cause why a new trial should not be granted.

Gaston in support of the rule.
Ruffin and Hillman contra.

TAYLOR, C. J. The trespass complained of in this case was (250) committed on the property while it was in the possession of a hirer for a year; and the question to be decided is whether an action on the case is the proper remedy. It is too firmly settled, both by principle and authorities, not to be shaken, that possession, either actual or virtual, is necessary to maintain trespass; for the action is properly to obtain a recompense for the wrong done to the possession, and, therefore, he who has parted with the right of possession for a limited time, without the power of resuming it, cannot complain that his possession is violated. The cases of *Ward v. McCauley* and *Gordon v. Harper,* in Term, and the cases decided in this Court establish the rule that neither trespass nor trover will lie unless there exists in the plaintiff a right of possession as well as of property. And it seems to follow very clearly that *trespass* could not be maintained in the present case. It has been argued that *trespass* will lie because the injury was immediate on the act done, and consisted in the destruction of plaintiff's property. It is true that the injury was immediate to the chattel itself, and also immediate to its actual possessor; but it was consequential only, as relative to the plaintiff's property; for he had parted with that for a definite time; and whether it existed or was destroyed, it still continued beyond his control for that period. He would be, ultimately, a sufferer by the loss of his reversionary interest, and to that injury the law has adapted an action on the case. This distinction prevails, with one exception, in real as well as personal property; for both tenant and landlord may have actions against a wrongdoer; the first, an action of trespass for an injury to the possession; the last, an action on the case for an injury to the reversion; as when the defendant, by stopping up a rivulet, (251) had flooded an adjacent close and destroyed great quantities of timber, both remedies were allowed to be pursued for the damage respectively sustained. The exception adverted to does not seem to be well established by authority, for the decisions are both ways relative to the right of a lessor to bring trespass against one who enters on his lessee at will; but supposing the right to subsist, it may be placed on the ground that the lessor has a virtual possession in that of his lessee, since he may put an end to the estate at his pleasure. I think the opinion appealed from is correct, and that there must be a judgment for the plaintiff. My brethren concur with me in opinion.

PER CURIAM. No error.

WHITE v. FORT.

The merger of a trespass in the felony (when the trespass is a felony) is a doctrine of the English law, founded not on policy but on the King's right by forfeiture; and as forfeiture is not here a consequence of felony, or, at any rate, if it be, is never asserted, the doctrine does not apply in this State.

APPEAL from *Daniel, J.*, at NORTHHAMPTON

Trespass *vi et armis*, in which the jury below found a verdict for the plaintiff, subject to the opinion of the court on a point reserved, which is as follows.

This was an action to recover damages of the defendant for the burning a tavern house and the furniture therein, privately in the night, which belonged to the plaintiff, which stood a short distance from the house in which plaintiff and his wife lodged. Doctor Smith, who lived with the plaintiff, slept in the tavern house; and it was the building in which travelers slept who tarried with the plaintiff. The (252) plaintiff had preferred to the grand jury a bill of indictment against the defendant for arson in burning the house, which was returned "Not a true bill." No other proceedings *criminaliter* were had upon the charge, and the plaintiff brought this action. The point reserved is whether it be not necessary to the maintenance of this action that the defendant be either convicted or acquited by a trial before a petit jury? Whereupon, by the court, *Daniel, J.*, it is considered that it is necessary to the maintenance of this action that the defendant be either convicted or acquitted by a trial before a petit jury on an indictment for felony; and, therefore, judgment was rendered for the defendant, and plaintiff appealed.

(262) *Hill and Gaston for plaintiff.*
Seawell for defendants.

TAYLOR, C. J. The two objections taken to the plaintiff's recovery are that the civil trespass is merged in the felony, a prosecution for which ought first to have been regularly had to the conviction or acquittal of the defendant; and that the rejection of the bill by the grand jury is not a sufficient compliance with the law to enable the plaintiff to maintain the action.

It is difficult to ascertain with precision the source whence the doctrine of merger was derived. As it exists only in those cases where forfeiture is the consequence of attainder or conviction, a presumption is furnished that the primary object was to cause persons to prosecute crimes, and thereby to increase the resources of the crown; on the other hand, as forfeitures were annexed only to the higher crimes, treason and felony, the suppression of which was most essential to the peace and welfare of society, the civil remedy may have been suspended in order to prompt the injured to (263) bring offenders to justice; not to increase the treasure of the sovereign, but to guard society against the effects of these more aggravated and, in early ages, more frequent offenses. Many offenses below the grade of felony are now more dangerous to society than many felonies; and when it is inquired why the civil remedy is not suspended in them until the offender is brought to trial criminally, the answer is, such offenses have grown out of the artifical state of society, and were unknown to the rude simplicity of its early condition. In that, robbery and rapine were the crimes to be punished; in its more advanced stages, artifice and fraud.

Whatever may have been the origin of the rule, there are ample proofs scattered through the books of its having been a fixed rule of the common law before the period of our revolution; and that in cases of conviction trover or trespass would lie against the wrongdoer. The principle of the action is referred to the policy of effecting the punishment of felons, and preventing the injured party from compounding them. Lofft., 90. There are *dicta,* but no adjudged case, countenancing a suit after acquittal until that cited from 12 East. What is said in that case is so strong, and to my mind unanswerable, as to conclude the question: "All the cases which show that an action lies after the conviction of the defendant for the felony apply strongly in support of it after acquital; for it is a stronger case to permit the party injured to proceed upon his civil remedy to recover damages after a conviction of the offender when the law has, by means of the forfeiture of his property consequent upon a conviction, taken away from him the means of satisfying the damages. Besides, when a defendant, after an acquittal of the felony, is called upon to make recompense in civil damages to the party grieved, it would be stranger

for him to be permitted to allege that he was not properly ac-
(264) quitted than in the case it would be to allege that he had not been properly convicted. And here the defendant cannot say, against the record of acquital, that this was a felony."

If this suspension of the remedy was the consequence of forfeiture alone, I should hold that it had no existence here; but I cannot satisfy myself that it is so. On the contrary, it appears to me to be one among the many inducements held out by the general policy of the criminal law for persons to prosecute. The rewards and immunities given to persons who bring offenders to justice, as well in cases where there is no forfeiture as where there is, afford abundant proofs of this policy. I cannot think that forfeiture has had any force in this State since 1778, when it was declared what part of the common law should be in force here. It is not probable that a prerogative should be designedly introduced which a most devoted, but at the same time an enlightened, supporter of the throne pronounced an "odious one." Lofft., 90. It was introduced originally to increase the king's ordinary revenue, a branch of which it constituted; and if such means of increasing the revenues of the State rightfully existed, it would not have been overlooked by the succession of able men who have filled the office of Attorney-General at different periods. Yet, with the exception of the confiscations and attainders during the war, not a single instance has occurred in the memory of any one wherein a forfeiture has been exacted. Yet some unfortunate persons have fallen victims to the law, leaving wealth which is now enjoyed by their posterity. I lay no stress on the two acts which have been passed, suggested, no doubt, by the fears of relations and creditors, and obtained from abundant caution. They ought not to be considered as legislative declarations that forfeitures existed, for every one knows how little interest is taken in private acts generally.

As to the manner in which the injured party shall prosecute,
(265) it is in vain to search the books, because instances of suit after acquittal have only recently occurred. All that good sense and reason seem to require is that the matter should be first heard and disposed of before a criminal tribunal. If the party prefer an accusation in good faith, although the bill should be rejected by the grand jury, he has done as much as he can do towards prosecuting, and has satisfied the policy of the rule. In England he might have his appeal, but here he can do nothing more than has been done in this case. I think the plaintiff is entitled to judgment.

HALL, J. It cannot be denied but that forfeiture for felony was part of the laws of England; and that the law in that respect, except so far as related to suicide, has not been altered by the laws of this State; but I believe there is no instance where the State has ever availed herself of the right which accrued by forfeiture; no mode has been pointed out by law to make the right available; no commissioners of forfeited property have been appointed, as has been done in regard to escheated property, and as was done in regard to confiscated property during the Revolutionary War. If, therefore, the enforcement of the right of forfeiture was the reason why the creditor of the felon could not recover in England, that reason will not hold good in this country.

The law in regard to lands had relation to the time of the fact committed, in regard to goods and chattels, to conviction of the felon. 4 Bl., 387. It is said, in the same book, "that in gross and atrocious injuries the private wrong was swallowed up in the public; that satisfaction to the individual was seldom made, the satisfaction to the public being so very great that, as the public crime is not otherwise avenged than by forfeiture of life and property, it is impossible afterwards to make reparation for the private wrong, which can only be had from the body or goods of the aggressor." In England, after forfeiture, there is nothing left for the creditors of the felon. In this State the fund out of which creditors may expect pay- (266) ment has never, as far as I know, been diminished.

But it is said that the law is founded in policy, which postpones or suspends the claims of individuals until the acquittal or conviction of the person charged with the felony. 12 East, 409. For, otherwise, felony would go unpunished. 1 Hale, 546.

The same evidence which showed a felony had been committed was also the foundation of the king's claim by forfeiture, and to this claim of the king that of the individual was obliged to yield until the question was settled whether a felony had been committed or not. If a felony had been committed, the claim of the individual was hopeless, for the reason before given; if no felony was committed, the king's claim was at an end, and the individual was at liberty to pursue the aggressor by suit. This appears to me to be the true reason why the suit of the individual was suspended until the issue of the prosecution for felony was known. Policy does not suspend the individual's right of suing where offenses are committed that are not felonies, as in perjury, forgery, or even in capital cases that are not declared felonies. 4 Bl., 97. If, then, policy dictated the rule, it was a policy intimately connected with and strongly allied to the king's interest to forfeitures upon conviction. But in England, where the king's claim was at an end, the individual's claim was available; so, I think, in this State, when the public asserts no claim by forfeiture, the claim of the citizen should be available.

But if I am mistaken as to this rule of policy, the record states that the plaintiff, by consent of the Attorney-General, prefered a bill of indictment against the defendant, and the grand jury returned it "Not a true bill"; and they did so, for aught that appears to this Court, without any collusion or fraud on the part of the plaintiff.

That being the fact, I think, in the spirit of that rule of policy, (267) he is entitled to his action. The grand jury were the only and proper tribunal from which a prosecution for the felony could originate. The plaintiff had no control over their finding.

It is true that finding is no bar to another prosecution; but if the plaintiff has acted without fraud, and no other witness can be procured to go before the grand jury, it is conclusive on him. As to the objection that the same evidence which has enabled the plaintiff to recover this verdict would have induced the grand jury to find the bill of indictment "A true bill," I cannot give any solution or explanation which I know to be founded in fact; but I can readily conjecture how such a thing might happen. Witnesses must go before the grand jury *in person;* but if they cannot be procured, their depositions, under certain circumstances, may be read on a trial in a civil action.

Goddard v. Smith, 1 Salk., 21, has been read to show that it was not sufficient that the bill of indictment should have been returned "Not a true bill," but that there should have been either a conviction or acquittal upon it. That was an action for a malicious prosecution, where the plaintiff alleged in his declaration that he was in due form of law acquitted on the indictment. The record showed that a *nolle prosequi* had been entered; the court said the record did not support the declaration, for the *nolle prosequi* was a discharge from the indictment, but not an acquittal of the crime. But they did not say that if it had been set forth in the declaration that a *nolle prosequi* had been entered, and the record had supported that allegation, that the plaintiff could not go on with his suit, because the prosecution had not been finally decided upon.

I think the plaintiff is entitled to judgment.

HENDERSON, J. If A. steals the goods of B. and sells them (268) to C., B. may recover the goods of C. before A. is convicted or acquitted of the felony; but if B. sells the goods to C. in market overt, B. could not, at common law, recover the property either before or after the conviction of A., for the sale in market overt changed the property; in neither case, that is, either before or after the conviction, at common law, could B. recover them from A., the thief. If policy and not forfeiture occasioned the merger, why could B. sustain his action against C., where they were not sold in market overt, and not against A.? Policy requires the conviction or acquittal of A. as much in the case where the goods are found in the possession of C. as when found in A.'s possession. If policy alone governed, the inducement to prosecute offenders should operate in both cases; there is as much necessity in the one case as the other. But at the common law there was no inducement to prosecute to a conviction, for before the statute of Hen. VIII the goods were lost to the owner upon a conviction; the former owner could not reclaim them even from the thief. It was his interest to prosecute, but not to convict. What had policy, then, to do with encouraging an honest prosecution? It was on the other side. But that statute repeals the common law in cases where the former owner aids in the prosecution by awarding a restitution; but the law of merger was in force long before the passing of this statute, and it is the influence of this statute which sustains the owner's right to the goods after a sale in market overt, for it gives restitution of the goods; it acts *in rem* on the thing, and annuls the common-law effect of a sale in market overt. By the statute of Hen. VIII the property is ordered to be restored to the owner who aids in the prosecution, and it is his whenever found and under whatever circumstances. Upon a conviction in an appeal of robbery, the appellant might obtain his goods if in the hands of the felon; but before the statute it affected not sales in market overt. The statute may since have been extended to convictions on appeal. I have not examined, nor is it necessary, in this case. (269) This is almost enough, if not quite, to prove that the law of merger is not founded on policy alone. But further, it is confined in its operation to cases of felony, that is, to cases of forfeiture; for all felonies amount to a forfeiture. Are there, then, no other crimes which the policy of the law forbids being compromised, or where inducements should not be held out for a prosecution? Forgery, perjury, every species of the *crimen falsi,* heresy, which latter was punished with death? In none of these is there a merger. For what reasons are not some of them as atrocious as the lesser larcenies; for instance, petty larceny, or even the stealing above the value of twelve pence? Why, then, does the law of merger not prevail in that case? Because there is no forfeiture. When we see the law of merger invariably follow the law of forfeiture, as the shadow does the substance, and never find it where forfeiture is not, it is a strong reason to believe that it is founded upon it and grows out of it; for it is a maxim in most governments, at least, it is so in England, that where the rights of an individual conflict with the rights or claims of the sovereign, that the rights of the individual must give way; and as by forfeiture all the goods of a felon are forfeited to the king, even those which were the subject of the prosecution, and for the stealing of which he was convicted, to sustain an action against him would impair the rights of the crown, as thereby the fund to be forfeited upon conviction would be lessened. If policy forbids the action, I should think it might be pleaded; and yet we find no such plea, for it appears to me that the maxim *Nemo audiendus est suam turpitudinem allegare* does not apply to such cases where policy forbids the act, for it is better that a man should shield himself by his own infamy than that the public policy should be violated. The manner in which it is got at shows that it forms no defense, that the sovereignty acts without regard to the defendant's benefit. If it appears in the declaration, (270) the defendant demurs; this is not offering this as a defense; it already appears; the demurrer calls the attention of the court to it. So if moved in arrest of judgment; but it is never pleaded. If it appears by the evidence on the trial, the court (that the rights of the crown may not be diminished) directs the jury to acquit the defendant. Upon the whole, I think that forfeiture, and not policy alone, gave rise to the doctrine of merger.

Whether the law of forfeiture is still in force, in cases where the State insists on such right, I think it is entirely unnecessary to decide. But I am not disposed to postpone doing justice to the plaintiff, in expectation that by so doing I shall impair the rights of the State by lessening the felon's estate, when the State comes to claim the forfeiture; for it would be a vain and fruitless expectation, for the State has not for at least half a century, and perhaps for a much longer time, in a single instance asserted that right. Therefore, I say, whatever may be her actual rights if she thought proper to enforce them, I cannot consent to delay doing justice to this plaintiff lest I should interfere with the claims of the State, when from the former consent of the State it is reduced to a moral certainty that no such claim will be asserted.

I do not think it necessary to give my opinion on the other point, to wit, that even if the rule of merger be founded on policy, enough has been done by the plaintiff in causing a bill of indictment to be preferred against the defendant, which the grand jury refused to find; but would observe that if in England an acquittal before the petit jury was required, such rule might not apply here; for there, if the Attorney-General will not prosecute or the grand jury will not find a bill, yet the person injured may still bring the offender before a petit jury by a prosecution entirely under his control, to wit, an appeal; and that the most rigorous policy could not require more in (271) either country than the utmost exertions of the injured party to bring the offender to justice. In this country the injured party's utmost efforts end with an honest exertion before the Attorney-

General or before the grand jury. In England more may be required of him, because there he can do more, a trial before a petit jury, for by his own act he can effect that. But for the reasons given in the foregoing part of this opinion, I think that the judgment of the court below should be reversed and judgment given for the plaintiff.

I am aware that *Lord Ellenborough*, in 12 East, founds the doctrine on policy. Whatever falls from that great judge deserves great weight; but it is mere *dictum*, not necessary to the decision of the case, it being an action brought to recover damages for an injury received by stabbing. The judge reported that it was within the statute, and therefore a felony, but the defendant had been acquitted; the question was, Could the action be sustained? It was adjudged that it could; for, let it be founded on forfeiture or policy, there was no merger; the acquittal barred future prosecutions, therefore, there could be no forfeiture. The policy of the law was complied with, for there had been a prosecution, and if not conducted with good faith, it might be shown. See 2 Term, 750, *Harwood v. Smith.*

Offenses made capital by statute, and not declared to be felonies, do not cause the trespass to merge, but where it is made a felony they do.

I think that judgment should be rendered for the plaintiff.

PER CURIAM. Reversed.

DEN ON DEMISE OF RUTHERFORD'S HEIRS v. WOLFE.

The act of 1801, permitting the nearest descendant or relation, not an alien, to inherit where there are nearer relations who are aliens, is not repealed by the act of 1808, providing a general system of descents, because the act of 1808 provides a system of descents so far only as regards the question of consanguinity, and, therefore, leaves untouched the law of alienage.

APPEAL from *Badger, J.*, at RUTHERFORD, in ejectment, the (272) facts of which are as follows:

James Rutherford, of Scotland, a native-born subject of the king of Great Britain, removed to the United States in 1781, and continued to reside therein until 1819, when he died, seized in fee simple of the lands described in plaintiff's declaration, intestate, without issue and without having ever been married, leaving him surviving brothers and sisters residing in Great Britain, natural-born subjects of the king of that kingdom, who are not citizens of the United States, but are aliens incapable of inheriting real estates. The said James left also surviving him one Walter B. Rutherford, a nephew of the said James, and son of one of the before-mentioned brothers of the said James; the said Walter is an alien, born in Great Britain, now residing in this State, but has never been naturalized. The lessors of the plaintiff are the children of the said Walter B. Rutherford, and are natural-born citizens of the United States, and the said lessors of the plaintiff are the only persons of kin to the said James who are citizens of the United States, or any of them. Catherine one of the lessors of the plaintiff, was born before the death of said James; the others were born since. The jury further find that the defendant is in posession of the premises as a tenant under the trustees of the University of North Carolina, who claim the land as escheated property. *Badger, J.,* who presided, gave judgment for the defendant, and plaintiff appealed to this Court.

Wilson for plaintiff.
Gaston contra.

(275) TAYLOR, C. J. The circumstances of this case, and the arguments addressed to the Court render it necessary, in my apprehension, to consider two questions: (1) Whether the title of the lessors of the plaintiff is valid, independently of Laws 1801, ch. 575; and if it be not valid, without the aid of that act; then, (2) Whether that act is repealed by the Laws of 1808, ch. 739. The second section of the first act provides that where any person shall die seized of real estate of inheritance in this State, leaving descendants, or other relations, citizens of the United States, who would according to law inherit were all the nearer descendants or relations extinct, but who, according to the now existing laws, cannot inherit, because there may be others who, if citizens, would be entitled to inherit, but, being aliens, cannot hold lands in this State, whereby such estate would escheat; in such case the nearest descendant or relation of the deceased, being a citizen of the (276) United States, shall inherit. The lessors of the plaintiff are the grand-nephew and nieces of James Rutherford, the person last seized of the land in controversy; and in claiming as heirs to him they must unavoidably derive their title through their father, W. B. Rutherford, who is an alien. Upon common law principles, this would form an insuperable impediment to their right, for in immediate descents a disability by alienism, not only in the parties, but in any intermediate ancestor, through and by whom the descent is made, will prevent it taking effect. Thus, if the son of an alien be a citizen, he cannot inherit to his grandfather, nor to his uncle, because he must claim through his father, who was not inheritable. But, where a person does not so claim,

by right of representation through an alien, it is no obstacle to the descent to him that the nearest heir is an alien; as where there are three brothers, all aliens, and the two youngest were naturalized and the eldest had issue, then the third brother died, it was adjudged that the land could not descend to the eldest brother or to his issue, because he was incapable himself, and his issue cannot claim by representation; therefore, it shall descend to the second brother. 3 Salk., 130. On this principle and distinction it was held, in the case cited from 4 Wheaton, that when a person dies leaving issue who are aliens, the latter are not deemed his heirs at law, for they have no inheritable blood, and the estate descends in the same manner as if no such alien issue were in existence. As the claimants in that case were the nieces of the person last seized, who was a citizen but whose issue were all aliens, and as the ancestor of the claimant was a citizen, it was not necessary to the decision of the cause to state the alternative branch of the proposition, and declare how the law was where a person claimed through an alien. That case would be an authority for the present, provided J. Rutherford had left an alien brother, and a nephew citizen, whose father had also (277) been a citizen; the alien brother would not obstruct the descent to the nephew, but would be overlooked, or set aside in his favor, although nearer in degree. The distinction between the failure of hereditary blood by reason of alienism and by means of attainder, showing that the next heir will take in the first instance, but not in the last, is stated in Co. Lit., 8a. But it is more perspicuously summed up in the law of forfeiture (p. 72). "When a man was not capable of civil right by nature, as an alien born and never naturalized, being unknown to the law, he was excluded from inheriting, and the next of kin within the allegiance who did not claim under him was admitted; or when he had incurred civil disabilities by his own voluntary act, not criminal, as one who entered into a religion or abjured the realm, he was taken to have undergone a civil death, and the next in course of descent entered. But when he is attainted of treason or felony, the law will not pass him over, and marks him out *in rei exemplum et infamiam.* Hence it is that though he was never in possession, nor those who claim under him more capable of inheriting than he by reason of the consequential disability arising from the attainder of the ancestor, yet the estate will be interrupted in its course to the collateral, and escheat. Reasons of political expediency may be deduced from the structure of peculiar governments for this distinction. But in the view of reason and justice the estate ought to go to the next collateral branch in the case of attainder, as well as in that of alienism, since it is not necessary for the collateral to derive this title in either case from the disqualified person, but may make it from a common ancestor. It seems to me to follow incontestibly that the act of 1801, before cited, bears distinctly on the case, and if it be repealed the land has escheated. Secondly: The act was made for the purpose of regulating descents in certain cases, and is conceived in a spirit of justice applicable to any system of descent, and founded on a policy that (278) is permanent and universal; for whether primogeniture prevail, or a distribution among all the childen, it is equally equitable in principle and conducive to the welfare of the republic that the title by escheat should not take place while there are any relations of the deceased who are members of the State; that it should not prevail over the claims of a widow. The act of 1808, which it is agreed has operated a repeal of the first, establishes certain canons of descent, which must prevail whenever they are inconsistent with any former regulation on the same subject. Its design was to trace the course of descent according to the degrees of relationship in which the parties stood to the person last seized, leaving all the qualifications and disqualifications to be ascertained by the existing laws. None of these enter into the purview of the act; they are settled by other principles, and depend upon a distinct policy. The common law, modified as it has been by several acts, must be resorted to to form a construction upon every part. Deprived of this essential aid, we shall be met by difficulties and absurdities at every step we take. The first canon provides that inheritance shall lineally descend to the issue of the person last seized. When we inquire, What issue? the common law answers that they must be citizens; but the act construed without this aid would make aliens inheritable. The common law would add, the heirs must also be legitimate; but an act passed in 1799 makes natural children inheritable to their mother in certain cases, and to each other. Who can believe that the act of 1808 designed to repeal that law? Again, must the issue be in full life at the death of the ancestor The act itself does not instruct us, but the common law answers that posthumous and after-born children are entitled to inherit. It appears to me that the two acts are perfectly reconcilable with each other, and that to construe the last a repeal of the former one would do manifest violence to the intent of the Legislature, who, by their (279) express declaration repealed only such laws as come within the *meaning* and *purview* of the act of 1808. I think the act of 1801 comes within neither, and the plaintiffs are entitled to judgment.

HALL, J. The object of the act of 1801 was to permit citizens to inherit the estates of their deceased relatives, although there were other persons more nearly related to the deceased who were aliens; that estates should take the same course of descent among citizens as if there were no *alien* relatives in existence who might intercept them.

I think the act of 1808 intended to regulate descents among citizens, in the number of which were included those whom the act of 1801 had imparted heritable blood and not to revive as to them the obstacles which before that time stood between them and inheritances. The act of 1808, as I think, did not intend either to create new heirs or to take away heritable blood from those who had it before that time; if it intended the latter, we may as well admit that it intended the former; and if so, it will have the effect to repeal that part of the common law which declares that aliens shall not inherit real estates; for this act declares that in particular cases lands shall descend to the next collateral heirs of the person last seized, and some of those heirs may be aliens, of whom the act of 1808 makes no mention.

Again, giving this construction to the act, it would repeal the act giving heritable blood to bastard children, for that act declares that such children may inherit from their mothers and from each other, which by common law they could not do. But I think that the two acts of 1801 and 1808 may stand well together; that it was not the object of the Legislature by the last act to repeal the provisions of the first. I am, therefore, of opinion that judgment should be given for the plaintiff.

Henderson, J. The act of 1808 forms of itself a complete (280) system of descents, so far only as regards the question of consanguinity. So far, and so far only, all prior laws are abrogated by it as coming within its purview and enactments. It affects not the law of descents in any other point. An alien son or brother is not by that act called to the inheritance, although the first may be the issue of the person who died actually seized or the second the next collateral relation of such person, there being a failure of his issue. The law of alienage being unaffected, by the act, as not relating to the question of consanguinity, upon which alone the act of 1808 operates, it is, therefore, not within its purview, that is, provisions. A person must, therefore, so far as regards consanguinity, bring himself within the rules prescribed by the act of 1808, for that act repeals all prior rules on that subject. But with personal qualifications or disqualifications that act has nothing to do. It does not repeal them, whether imposed by the common or statute law. That the act of 1808 embraces the rules and orders by which the consanguinii shall be called to the succession is apparent upon its face, for it is silent as to all other rules; nothing is said on the subject where there are no consanguinii or none who can take. The title of the lord by escheat, the widow under the act of 1801, are left to the operation of prior laws. In fact, if the act of 1808 is an entire provision on the subject, as I take it to be, it, of course, provides for the rule which it abrogates to providing another rule; for on that the abrogation depends.

Where, then, are its provisions for the present case? What other person does it call to the inheritance? To whom would the act of 1808 give this property? To no one. Then it has made no provision for it. Nor is it a *casus omissus;* for it does not affect to make provision for it. The law, therefore, of 1801, under which the plaintiffs claim, interposes not between the plaintiffs and one clamiing under the act of 1808, but between the plaintiff and the State, claiming under the laws of (281) escheat. I, therefore, consider the act of 1801 as unaffected by the act of 1808, and that the judgment of the Superior Court should be

PER CURIAM. Reversed.

Cited: Rutherford v. Green, 37 N. C., 124; *Winton v. Fort,* 58 N. C., 250.

DOE ON DEMISE OF WALKER AND WIFE v. GREENLEE.

When a purchaser under the sheriff, in support of his title, produced a mere memorandum from the clerk's docket of the amount of the judgment, dated in 1783, and proved that nothing more could be found among the records connected with the suit, it was *Held*, that the entry, having been made in a new and frontier county, at the close of the Revolutionary War, might be received as a record, though if the judgment were of recent date it would be otherwise.

EJECTMENT, tried before *Badger, J.*, at WILKES.

The wife of the lessor of the plaintiff claimed under the original grantee of the land, William Price, and regularly deduced title.

The defendant claimed as heir at law to one James Greenlee, under a judgment obtained by said James against William Price, an execution and sheriff's sale thereon; and in proof of his title the defendant produced a writ of *fi. fa.* and a deed from the sheriff to James Greenlee as the highest and best bidder, dated in 1783. To prove the existence of the judgment on which this *fi. fa.* issued, the defendant produced a paper certified by the clerk of the court, and apparently an extract from the clerk's docket, in these words, viz.:

STATE OF NORTH CAROLINA, BURKE COUNTY:

Court of Pleas and Quarter Sessions, July Sessions, 1783.
Trial Docket, July, 1783.

JAMES GREENLEE v. WILLIAM PRICE.

Original attachment—Levied on his land. Judgment by default, and writ of inquiry. Verdict, 41*l.* 2*s.* 6*d.* and costs.

This was objected to as being insufficient to support the title of a purchaser at a sheriff's sale; and the defendant produced a witness, who swore that he had searched the records of Burke County, and that the paper produced contained a copy of every original (282) paper to be found among the records of that court relative to the suit, except the attachment on which the proceedings had taken place, and he believed he had seen that among the papers.

The presiding judge sustained the objection, and instructed the jury that the defendant had not shown such a record as would support his ancestor's purchase at the sheriff's sale. Verdict for plaintiff; new trial refused; judgment, and appeal.

Wilson for defendant.
Gaston contra.

HALL, J. If the record offered purported to be a judgment of (283) recent date, I should hesitate before I could receive it as such. But it is a record of 1783, made in a new and frontier county court at the close of the Revolutionary War, at a time and in a place where we may presume the rescords were made and kept in a slovenly manner. Under these circumstances I think the record offered as a judgment may be deemed sufficient. The sheriff's return under the attachment is that he levied on this land; there was a judgment by default, and on the writ of inquiry the jury assessed damages to 41 *l.* 2*s.* 6*d.* and costs. On this verdict we must take it that the court gave judgment, from that judgment a *fieri facias* issued, a sale took place under it, and the sheriff made a deed of conveyance for the lands in question to James Greenlee the highest bidder. The affidavit of Greenlee and the attachment are not shown, but we may reasonably presume they existed, from the proceedings which have taken place in court afterwards, and which are now shown. For these reasons, I think the rule for a new trial should be made absolute. The other judges concurred.

PER CURIAM. New trial.

DEN ON DEMISE OF FRANKLIN v. TERRELL AND CAMP.

A sale of land by the marshal for taxes, after a legal tender to the marshal by a part owner of all that was due, vests no title in the purchaser.

EJECTMENT, tried below before *Badger, J.*, at RUTHERFORD.

The jury found a verdict for the plaintiff, subject to the opinion of the court on the following case: The land mentioned in the plaintiff's declaration (of which the defendants are in possession) was granted to Mary Franklin, the elder, about 1780. On the death of Mary Franklin, intestate, the premises descended upon Mary, the lessor of the (284) plaintiff, Thomas Franklin, and others, children and heirs at law of the grantee.

On 1 July, 1808, the marshal of the district of North Carolina conveyed the lands to Camp for the sum of $2.38 that being the amount of tax due thereon by virtue of an act of Congress of 14 July, 1798, to satisfy which the land was sold. About one year previous to the sale for taxes Thomas Franklin, then a part owner of the land, made a legal tender to the collector of all that was due to the United States upon this land; the collector refused to receive it, and no demand was made of the tax until the sale of the land.

Since the conveyance to Camp, Thomas Franklin and the other children and coheirs have released and conveyed their interest in the premises to the lessor of the plaintiff.

If the court shall be of opinion that the defendant has a good title under the marshal's deed, then the verdict to be set aside and a nonsuit entered; otherwise, judgment to be entered upon the verdict for the plaintiff. The court gave judgment for the plaintiff, and defendants appealed.

For the defendant it was argued that on a sale for taxes it was only necessary for the purchaser to show that the tax was unpaid, and that the sheriff had sold and conveyed. It is not necessary to show an advertisement.

On the other side it was said that in every exercise of a naked power it is necessary that every circumstance prerequisite to the exercise of the power should precede it and the person claiming under it must show that it did precede it. If a party claim under the deed of a marshal selling for a direct tax, he must show every act *in pais* necessary to precede such sale. The deed is not *prima facie* evidence that the land was subject to such sale or that the acts *in pais* which give validity (285) to the deed did exist. 4 Wheaton, 79, and 5 *ibid.*, 116, 119, were referred to.

Hall, J. I think there can be no reason in this case for granting a new trial. It is set forth on the record that a tender was made of the taxes due on the land; that tender, as to this question, was tantamount to a payment of them; and if no taxes were due, the marshal had no authority to sell. The consequence is that the deed executed by him is of no more validity that if it had been executed by any other unauthorized person; and in this opinion my brethren concur.

Per Curiam. No error.

CAMERON, CHAIRMAN OF THE COUNTY COURT OF CUMBERLAND, TO THE USE OF THE TREASURER OF PUBLIC BUILDINGS OF THE COUNTY OF CUMBERLAND v. CAMPBELL AND OTHERS.—From Cumberland.

Where the condition of a sheriff's bond was in these words, "That he shall well and truly account for and pay into the hands of the *county trustee*, for the time being, all such sum or sums of money as may be or shall come into his hands, or which he ought to collect for the ues of the county; and *in all things comply* with the acts of the General Assembly in such case made and provided"; it was *Held*, that when the sheriff had received a part of the tax laid for the repairs of public buildings, the condition of his bond was violated upon nonpayment of it to the *treasurer of public buildings*, to whom, by the act of 1808, the sheriff is directed to pay it.

THIS was an action of DEBT on the following bond:

"Know all men, etc., that we John McRae, Robert Campbell, etc., all of Cumberland County, are held and firmly bound unto John Dickson, Esquire, chairman of the county court of Cumberland, in the sum of £5,000 currency, payable to the said chairman or his successors in office, to which payment well and truly to be made," etc.

The condition of the bond was in these words, viz.:

The condition of the above obligation is such that whereas the above bounden John McRae hath this day, by the justices of the county aforesaid been duly elected and appointed high sheriff of said county: Now, if the said John McRae shall well and truly account for and pay into the hands of the county trustee for the time being all such sum or sums of money as may be or shall come into his hands, or which he ought to collect for the use of said county, and in all things comply with the acts of the General Assembly in such case made and provided, then the above obligation to be void; otherwise, to remain in full force and virtue.

The defendant pleaded that the conditions had been performed; and plaintiff, in his replication, assigned as a breach that John McRae had received $396 of the tax which had been assessed for the repairs of the public buildings of the county, and that the said sum was yet due to the treasurer of public buildings and not paid.

To this replication there was a demurrer and joinder in demurrer.

It was admitted by the plaintiff that the county trustee had received all the public money payable to him, unless he was authorized to receive the aforesaid sum of $396.

The presiding judge overruled the demurrer and gave judgment for the plaintiff; and it was agreed between the parties that should this Court sustain the demurrer, then, to prevent circuity of action, the parties submitted a case similar in all respects to the foregoing except that the breach assigned was the nonpayment of the $396 to the county trustee; and further, that should the demurrer in the first case be sustained, the parties agreed that the writ and declaration might be amended by substituting the name of the county trustee for that of the treasurer of public buildings.

Gaston and Ruffin for plaintiff.
Hogg for defendants.

TAYLOR, C. J. The question presented in this case is, whether the breach is properly assigned in the declaration, in stating that the sum due has not been paid to the treasurer of public buildings. The defendants contend that the stipulation of the bond is that the moneys
(287) collected by the sheriff should be paid to the county trustee, and to
no other person; and that they as securities to the sheriff cannot be justly chargeable beyond or in a different manner from their engagement. In 1798 the Legislature, under a belief, as stated in the preamble of the act that there was no law then in force to compel the sheriffs, or any other person to give bond and sufficient security for the collection of the county and poor tax, passed an act, chapter 509, making it the duty of every sheriff thereafter appointed to enter into bond, with sufficient security, payable to the chairman of the court and his successor in office, for the due collection and accounting for the county and poor tax, as well as the public tax. When this act was passed there were in force three laws authoring the county courts to lay a tax for the purposes of the public buildings. By the Laws 1741, ch. 33, the tax was to be laid for two years, and to be collected by the sheriff in the same manner with all other public and parish taxes, and to be accounted for by him to the justices of the county court on oath. Viewing the first section of this act by itself, it would seem that this tax was only temporary, and to be laid at once for two years. But the second section of the act removes this idea, for by that the justices are empowered to lay a tax of the same character, viz., a poll tax from time to time, as often as it might be necessary to repair or erect public buildings. This authority is repeated and confirmed by Laws 1795, ch. 433, by which the taxes are to be laid and collected annually. And by the same act a treasurer of public buildings is directed to be appointed, who, amongst other duties, is to call upon former commissioners who may have received moneys for the aforesaid purposes. From these two acts it results that it was the duty of the sheriff to collect the taxes for public buildings before 1798, and
he was accountable for them to the county trustee by the express
(288) terms of Laws 1777, ch. 127. It was probably intended by the
act of 1795 before cited, to make him accountable to the treasurer of public buildings, but such intention is but obscurely expressed, and

could not safely be assumed. But it certainly would have been a less complicated mode of settlement than to make him first pay the county trustee, and then the latter the treasurer of public buildings. As to the construction of the act of 1798, it seems, from the second section, that the sheriff was to account with the county trustee and the wardens, because he is allowed the same commissions with them as in the settlement of his public accounts with the treasurer. The county trustee is in this act called, I believe for the first time, the county treasurer, but the former is evidently meant, because the same appellation is used in some subsequent acts in relation to duties exclusively belonging to the county trustee. The terms employed in the act, "county tax," signify every sort of tax levied for county uses in contradistinction to the taxes levied for the use of the State by the public revenue laws; and if the condition of this bond had been drawn in the very terms of the act it would certainly have bound the sheriff to collect and account for the taxes laid for the public buildings. This brings me to Laws 1808, ch. 755, by which the sheriff is again authorized to collect the tax for public buildings, and is for the first time made accountable to the treasurer of public buildings, against whom he is entitled to the same commissions as he was before against the county treasurer and county wardens. It may be observed here, in passing, that the treasurer of public buildings is contrasted with the county treasurer, by which it is plain that the county treasurer is meant by the latter. This act was in force when the bond was given, and for a long time previous, and it was in the power of any person becoming security for the sheriff, by an inspection of the law, to ascertain to whom he was accountable for this portion of the tax, and the extent of his liability. It was undoubtedly com- (289) petent for the Legislature to change from time to time the mode of the sheriff's accountability without impairing the force or effect of the bond required by the act of 1798; and the sheriff being liable to account for all he collected for county use, it could be but a shadowy difference to the securities whether he were bound to pay it to the trustee and wardens, or a portion of it to the treasurer of public buildings. The breach must necessarily be assigned according to the truth of the case; and a bond conditioned to account with the county treasurer would not be forfeited by a failure to account with the treasurer of public buildings. But if the condition were to account generally, the breach would be properly assigned according to the manner in which the sheriff was liable by law; *prout lex postulat.* If the question, however, is considered on the words of the bond, they will, without any strained interpretation, provide for the case as it was intended by Laws 1808, ch. 755. The condition contains two distinct undertakings: the one is that the sheriff shall well and truly account for and pay into the hands of the county trustee, for the time being, all such sums of money as may be or shall come into his hands, or which he ought to collect for the use of the county. The other is that he will in all things comply with the acts of the General Assembly in such cases made and provided. The first branch clearly provides for all the duties imposed on the sheriff in relation to the county trustee. Nothing could be added to it to make the obligation more distinct; it is complete in itself. If, then, the second branch is construed to import only the same thing with the first, it would have been inserted in vain, and is insignificant and superfluous. But as the acts of Assembly prescribe other duties to the sheriff, such as accounting with the county wardens and the treasurer of public buildings, if this clause be construed to embrace those duties, it becomes useful and sensible; it would be against all just construction not so to construe it. (290) The word "such" I understand as relating to any act of Assembly making the sheriffs responsible for any portion of the county tax to any other person besides the county trustee. From this reasoning it seems to me to follow that it was the intention of the parties to enter into the bond prescribed by the act of 1798, but so altered in its phraseology as to provide for the changes in the sheriff's accountability which laws subsequently passed might have introduced. I think there should be judgment for the plaintiff.

HALL, J. The act of 1798, New Rev., ch. 509, prescribed it as a duty of sheriffs to enter into bonds with security for the due collection of the county and poor tax. The act of 1808, New Rev. ch. 755, authorizes and directs the sheriffs to collect the taxes for defraying the expense of the public buildings, and to account with the treasurer of public buildings for the same, and that they shall be entitled to the same commissions, and subject to the same rules, regulations, and restrictions in their settlement with the treasurer of public buildings as they are in their settlements with the county trustee.

Taxes for public buildings are as much county taxes as any others that are laid in the county for collection. And I think the Legislature intended that the bonds given by the act of 1798 should be a security, not only for county taxes which were then usually laid and collected and paid to the county trustee, but for any other county taxes which might afterwards be imposed, payable to the treasurer of public buildings. The condition of the bond is broad enough, I think, to cover the taxes now in question. It is that the sheriff shall "in all things comply with the acts of the General Assembly in such case made and provided"; and the act expressly directed the money in question to be paid to the treasurer of public buildings. I cannot but think that the bond covers the delinquency complained of. There was not more difficulty in paying the taxes to the county treasurer of public buildings than there (291) was in paying them to the county trustee. I think the judgment of the Superior Court should be affirmed.

HENDERSON, J. The material words of the sheriff's bond on which this suit is brought, are that he "shall well and truly account for and pay into the hands of the county trustee for the time being all such sum or sums of money as may be or shall come into his hands, or which he ought to collect for the use of the county, and in all things comply with the acts of the General Assembly in such case made and provided." By the acts of 1808 the sheriff of the county is authorized and empowered to collect the taxes laid for the erection and repairs of the public buildings, and he is required to pay the same to the treasurer of public buildings. And in making the settlement, paying the money, etc., he is made subject to the same rules as in making his settlemnt with and paying the money to the county trustee. And it is further declared that he shall not be reëlected sheriff unless he shall have produced the receipt of the treasurer of public buildings. As the words of the act are not imperative that he shall collect, but only that he is authorized and empowered, some doubt may be entertained whether a bare omission to collect is a breach of official duty; but I think there can be none as to his not paying over money which he has actually collected by virtue of his office and not barely under color of his office. The act complained of is, therefore a breach of official duty; it is the withholding from the proper person money which came into his hands as sheriff. But it is said that this bond does not extend to this case, because the act of 1808 does not require that any bond should be given by the sheriff to discharge the duty authorized by that act, and that all the words of this bond are referable to other duties. I think the inference is not correct. When an act of Assembly directs that all sheriffs, clerks, etc., shall give bonds for the faithful discharge of their duties, the (292) bond becomes attached to the officer, and when afterwards new or other duties are attached to the office they become obligatory at least on all future incumbents; and these official bonds embrace those new duties as well as the old. When the Legislature passed the act of 1808, it was unnecessary to declare that the sheriff should give bond for his performance of them, for it was secured by the official bond which by prior laws was attached to the office. To declare this again would be unnecessary. Where highly responsible duties are superadded, it might be prudent to increase the penalty of the bond. Had this additional duty been added after the bond in question had been executed perhaps the securities might have reason to complain, for they might be willing to become responsible that their principal should perform all duties by the laws imposed, and yet be unwilling to undertake for those imposed by after-made laws (if such be the fact, I beg to be understood as expressing no opinion). But such is not the case; no after-duty is imposed; for the sheriff was authorized to collect these taxes by prior laws. And if the bare appointment to the office did not make this an official duty, but the official breach was in omitting to pay over the taxes after having collected them, it is to be remembered that they, his securities, afforded to him the power of acting as sheriff; and should be answerable for all county moneys which he collected by virtue of his office, not barely under color of his office.

PER CURIAM. Affirmed.

Cited: *Boyer v. Bradshaw,* 32 N. C., 232; *McKenzie v. Buchanan,* 51 N. C., 33; *Wilmington v. Nutt,* 78 N. C., 180; *S. c.,* 80 N. C., 267.

(293)

GILKEY v. DICKERSON.

1. An execution binds property from its *teste,* so that no sale of it after execution issues is valid against the execution.
2. It is not necessary that a sheriff should absolutely touch personal property or remove it out of defendant's possession to constitute a levy; but the mere delivery by a defendant of a list of his negroes to the sheriff is no levy; though had the negroes been present, and had the plaintiff signified that he held them bound to answer the execution, and if no opposition was made to the sheriff's possessing himself thereof if he desired it, it would have amounted to a levy.

THIS case was here 9 N. C., 341. On the new trial below before *Badger, J.,* at RUTHERFORD, the case appeared to be this:

The plaintiff on 19 September, 1820, bought certain slaves of one Alley for value and *bona fide,* and took them into possession; and afterwards, on 7 October, 1820, the defendant (who was coroner of the county) levied on the slaves by virtue of an execution issuing from September Term, 1820, returnable March, 1821, at the instance of the State Bank against Alley, took the slaves into his possession and sold them.

The State Bank obtained its judgment at March Term, 1820, for $2,130; a *fi. fa.* issued thereon to the defendant (Alley being then sheriff), returnable September Term, 1820, and tested of March; the execution was returned by the coroner at September Term without any indorsement thereon, when the clerk altered the *teste* and issued the same writ as an alias from September, 1820, to March Term, 1821, and it was under this last writ that the defendant levied and sold.

The plaintiff on the trial introduced Alley to show that a levy had been made on the first writ of *fi. fa.* to the value of the debt; Alley swore that the defendant in June, 1820, called on him and asked him for a list of property which he might sell to satisfy the execution, and Alley gave him a list of sundry negroes equal in value to the amount of (294) the debt, but these negroes were never taken into possession by defendant, and in September Alley carried them to Tennessee and sold them.

There was no other act done by the defendant as a levy except taking the list as above stated.

The presiding judge instructed the jury that there was nothing in the transaction between the defendant and Alley which amounted to a levy to discharge Alley; that the negroes which plaintiff had purchased were subject to the execution under which they were sold by defendant in October, notwithstanding the sale to the plaintiff was fair and for full value; that the defendant was justified in selling them by his execution, and was entitled to a verdict.

There was a verdict and judgment for defendant, and the case stood before this Court on a rule to show cause why there should not be a new trial.

TAYLOR, C. J. It will admit of no doubt that the execution which issued against Alley bound all his property from its *teste,* which was in March, 1820; and notwithstanding a *bona fide* sale of any part of it after that period to the plaintiff, it was still liable to be taken in execution. But the plaintiff alleges that a levy having been made of the negroes and property belonging to Alley of sufficient value to pay the balance of the debt, the two negroes now sued for were discharged from the lien and became a fair subject of private sale. The inference would be correctly drawn if a levy on sufficient property had in fact been made; but it plainly was not made. It does not appear that the coroner ever saw the property, or might have seen it if he had desired. The delivery of a list merely, without some act on the part of the coroner amounting to an actual seizure, or sufficient at least to vest a special property in him, so as to maintain trover against one who converted them before a sale cannot be deemed sufficient. Had the property (295) been present when the list was delivered, and the coroner had signified that he held it bound to answer the excution, and there was no opposition to his possessing himself of it had he so desired, it would have amounted to a levy; for it has never been understood that actual touching the property was necessary, or that it must be removed out of the possession of defendant.

The law allows the sheriff to take a bond for its forthcoming, and if he think proper to incur the risk of leaving the property with the debtor without a bond he is at liberty to do so. The coroner himself by not returning this levy seems not to have considered it as one; and upon the whole there is no reason to disturb the verdict.

HALL, J. I think the judgment given in the Superior Court was a correct one. It is not stated in the case whether the alias *fi. fa.* bore *teste* before the purchase made by the plaintiff or not; but the alias was a continuance of the first *fi. fa*, and no position is better founded than this, that an execution binds the property of the defendant before it is levied so as that no sale or disposition made of it by him is valid against such execution. It is also true that if the sheriff levies upon property sufficient to satisfy the debt, that property must be accounted for before other property of the defendant is liable. But in this case the negroes which the defendant gave the coroner a list of were not levied upon by him or taken into his possession; giving such *teste* was not a levy. I, therefore, think judgment should be given for the defendant.

HENDERSON, J., was of this opinion also.

PER CURIAM. No error.

Cited: Palmer v. Clarke, 13 N. C., 357; *Clifton v. Owens,* 170 N. C., 611.

(296)

BECKERDITE v. ARNOLD.

A justice's execution binds chattels from its *teste.*

TROVER, tried before *Norwood, J.*, at RANDOLPH, brought to recover the value of a mare, and the facts on the trial below appeared to be these: The plaintiff purchased the mare of one Dockery on 2 or 3 October, 1822, and the defendant, who was a constable, afterwards levied on and sold the mare by virtue of an execution from a justice of the peace against Dockery, dated 1 October, 1822, which came to his hands before the sale by Dockery to the plaintiff.

It appeared also that the judgment against Dockery was obtained in the name of Lamb to the use of Pierce on 19 January, 1822, and that execution was stayed thereon by Lamb. It was held by *Norwood*

J., on the trial below, that the justice's execution bound from the *levy,* and not from the *teste,* and from the judgment rendered defendant appealed.

J. Martin for the appellant.

TAYLOR, C. J. No difference exists between the lien of a *fi. fa.* issuing from a magistrate and one from a county or Superior Court, so far as they regard chattels. Both bind the property from the *teste,* which, with respect to a justice's execution, must be understood the date of its issuing. The authority of the officer is in both cases equally complete to levy and sell the property by virtue of the execution, and no further act is required to confirm or validate (297) it. But the execution of a magistrate binds land only from the levy, because the authority to the constable is but conditional and qualified; he can only levy upon land for want of goods and chattels to satisfy the execution, and because after the levy so made he has no authority to sell, nor is any authority communicated by the same execution, but a return of the levy is to be made to the justice, and by him to the county court, by whom alone the order to sell land can be made, and by the sheriff alone can the order be executed. The only operation of the first execution, therefore, is to create a lien upon land by virtue of the levy; when that is done it has discharged its office, and hence it has been repeatedly decided that land is not bound in such an execution before the levy, for at the *teste* of the execution it is contingent whether the land will be liable or not. This partial and uncertain effect cannot be predicated of a *fi. fa.* against chattels and there is consequently a difference in the respective liens.

HALL, J. It seems that the execution was in the hands of the constable, who is also the defendant, at the time when the plaintiff purchased the property in question of the defendant in the execution. I therefore think that the execution was a lien on the property, so as that the defendant in the execution could not dispose of it; and that the defendant in this case, being the constable, was in the discharge of his duty when he levied upon it and sold it. I think there should be a new trial.

And of this opinion was Judge HENDERSON.

PER CURIAM. New trial.

Cited: Deaver v. Rice, 20 N. C., 569.

(298)

WOOD v. BULLOCK AND OTHERS.—From Tyrrell.

A *feme sole* makes a will, marries, and survives her husband; the will is good.*

THIS was an issue, will or no will, and on the appeal of the defendants stood before the court on a rule to show cause wherefore a new trial should not be granted. The facts are that Mary Wood, then Mary Spruill, on 26 November, 1818, duly executed the paper-writing offered as a will in the presence of two witnesses, and placed it in the hands of Popleston for safe keeping; that afterwards Mary Spruill intermarried with Wood, and previous to her marriage executed a settlement, conveying all her estate, real and personal, to trustees; Wood died, leaving his wife surviving him, and the trustees after his death reconveyed the estate to the wife. The will continued in the hands of Popelston uncanceled until the death of Mary Wood; and the said Mary, after the death of her husband, and after the reconveyance of the estate to her by the trustees, told Popelston to take care of the paper, for she wished it to stand as her will.

The court below held that the marriage settlement was a revocation of the will, and that it could not be republished by parol so as to pass the real estate, but that her declaration to Popleston amounted to a republication as to the personalty, if it were so intended.

HALL, J. If a will be made before marriage, and the wife survive the husband, is it a republication? It is not to be controverted at the present day that the marriage of a *feme sole* is in law a revocation of a will made by her. *Loe v. Staple*, 2 Term, 684; though it is to be remembered that the reason of this rule is not, as has been sometimes supposed, an *incapacity* of the *feme* to *make* a will arising from the state of converture. The rule proceeds on a well-(299) known maxim of the common law, which, deriving no support from the artificial refinements of technical reasoning, carries at once conviction to the understanding by the simple force of reason and truth. The truth is that, as a will is ambulatory, in other words, as it may be altered or revoked to the very last moment of the testator's existence, there must not only be a capacity to devise at the time of *making,* but also at the time of consummating the will, viz., at the death of the testator. Now, as the wife could not control her property after marriage, no matter what events might render it necessary, there is a propriety in annulling entirely any distribution made of her property; lest if supported or not annulled it might contravene her wishes in its subsequent disposition founded on events arising during coverture; for if there be reason in permitting a *feme sole* to exercise her understanding in making or altering a will, equal reason is there that when the law declares that by marriage she has technically lost understanding, if I may so speak, to make or alter a will, she shall not be prejudiced by an adherence to that already made; she shall be intestate.

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*Otherwise now by Revisal, 3116.—ANNOTATOR.

But the question now presented is not as to the effect of marriage on the will of a *feme sole,* but as to the effect produced by her surviving her husband, having made a will *dum sola;* and it must be confessed that contradictory opinions have been given on the point. In its investigation, while I readily admit the propriety of the rule *stare decisis,* I would yet respectfully examine and weigh the reasoning advanced in support of the different opinions.

In support of the idea that the will is effectually and completely revoked by marriage so that survivorship of the wife does not republish it, the reasoning, when condensed, appears to be as follows:

It is essential to the nature of a will that it should be ambulatory and liable to be altered or revoked at any period during the life of testator. A woman by marriage disables herself from making, altering, or revoking a will, and therefore upon marriage the instrument needs one essential characteristic of a will, viz., liability to alteration or revocation, and, of course, must cease to be a will; and having once ceased, continues to be no will, whether the wife survive or not. (300)

This argument, in fact, begs the question; it is founded on a fallacy; it assumes that because at one period, viz., during coverture, it loses the character of a will, it loses it at another period, viz., after coverture has ceased. Now, the very question in controversy is whether the paper is to be construed in the same light *during* coverture and *after* coverture. It is an admitted point that during coverture the will is revoked, and the reason has already been assigned; but that reason can apply with no propriety to the paper after the coverture has ceased. The truth is that the argument above can never prove more than that *during coverture* the will is revoked, and if the wife dies during coverture she dies intestate. But the ground taken in it really supports the idea that the will is established again by the survivorship of the wife; for it is said that the will is ambulatory; this is true, and this character belongs to it until testator's death. If, then, during testator's life its ambulatory character should be *suspended,* not *destroyed,* by a technical reason, viz., that the wife has no will because of coverture, it would seem that when this technical reason was removed by husband's death, it should again be ambulatory on the obvious principle that *cessante ratione, cessat et ipsa lex.*

Again, the case now before the Court serves to illustrate the ground on which, in one class of cases, the survivorship of the wife gives validity to her will made *dum sola;* I mean that class in which no change in testator's situation has been produced by marriage. Thus we see Mary Spruill, while sole, selecting the objects of her benevolence and distributing her bounty among them. In this act she has furnished conclusive evidence that in the situation in which (301) she stood when unmarried she desired to make such and such a disposition of her estate. We find her years afterwards in precisely the same situation. The law will scrupulously respect her desires in disposing of her property, as it will those of every person, provided the ceremonies required in declaring those desires be complied with, and it is unwilling that she should die intestate. Is it not a very fair, nay, the only rational, presumption that, as under certain circumstances she devised or bequeathed in one way, that under precisely the same circumstances she would wish to make precisely the same disposition of her effects, more especially as a contrary desire might so easily have been expressed by a new will, and as the intention not to die intestate under these circumstances has so plainly been expressed by the will already made?

An attempt has been made thus far to consider the question without reference to authority; but this is not wanting in support of the position that upon the death of the husband the will is republished. A leading and very early case in which the subject is referred to is *Brett v. Regden,* Plowd., 343a, in which it is thus put: A *feme sole* makes her will on 1 May, and gives land thereby, and afterwards on 10 May she takes husband, who dies on 20 May, and afterwards the woman dies on 30 May; the devise is good, and yet, if it should be considered according to the time of the date, the will would be countermanded by the espousals; but it is not so, for *it does not take effect until her death,* at which time she was *discovert,* as she was at the time of making the will, and the intermarriage shall not countermand that *which was of no effect in her lifetime.* The reason, viz., that a paper, which must owe its validity to the death of its maker, and during his lifetime is of no effect, cannot be affected by any circumstances arising before it is of effect, is to my mind unanswerable. This respectable authority is sustained by *Godolphine,* Orph. Leg. fo., 29, sec. 1, and *Forse v. Hambling,* 4 Coke, 61; to which I would add, that without intending to quote the book as an authority, for it is but a compilation, though a most respectable one, the same doctrine is laid down by Cruise, title Devise, ch. 6, sec. 47. I am therefore of opinion that the will of Mary Wood, made when she was Mary Spruill, is good and effectual to pass both realty and personalty, and that a new trial should be granted.

HENDERSON, J. This is a question on which the elementary writers differ, and I cannot find a single common law adjudication on the point. We must, therefore, resort to first principles to decide the case. A last will being in its nature revocable and ambulatory, and being supposed to contain the last wishes of the maker as to the disposition of his property after his death, requires that the maker should be a free agent, not only at the time of making the will, but also at the time of death; otherwise, the power of revocation, which is incident to the very nature of a will, could not be exercised. But I can see no reason why this free agency should continue uninterrupted from the making to the time of death. I think the reason of the thing is answered if it existed at the time of death, and that a temporary want of free agency, such as is effected by the marriage of the maker, being a *feme,* operates only as a *suspension* and not as a *revocation.* If she dies during the marriage, the will is considered as revoked, for if she had desired to revoke it she had not a free will to do it; the law, therefore, does it for her. But if she survives her coverture, and does not revoke it, there is no necessity for the law doing it, for had she desired it she could have done it herself, marriage in this respect operating like captivity. And it seems agreed by all that if a person makes a will and is after taken captive, it operates only as a suspension of the will, and if the maker dies in captivity the will is revoked, but if he regains his liberty it sets up his will again without any republication. But it is said that (303) marriage is different from captivity, because it is voluntary and captivity involuntary. It is true, there is that difference; but I cannot see that different results, not connected with the question whether the situations were voluntarily or involuntarily assumed, should be drawn from it. If the want of the *power of revocation* was inflicted as a *punishment* for crime, then it would be all-important to make this difference in the results; but we know that it is not. The want of that power, to wit, of revocation, arises from want of free agency in both cases; and it is, I think, restored by the restoration of free agency in both cases. This case has also been compared with revocations or rather ademptions, by a feoffment or grant of the lands devised, although the devisor takes back the same estate in the lands. The cases, I think, are very unlike each other. A devise of lands is looked upon as a conveyance, not as a testament is in the civil law, an appointment of an heir; therefore, a person must have that which he devises, as he must have that which he grants, and there can be no estoppel in wills as in deeds, by which the devisee could take as in case of a deed, for estoppels operate only where there are *parties,* and there are *no parties in a will.* The will being ambulatory and revocable, it is necessary that the devisor should not only have the power to devise, that is, to grant when he makes his will, but that he should have the uninterrupted power up to the time of his death: by power here I mean ownership in the land. If, therefore, he disposes of the land, the will is revoked, because he has not the thing which is attempted to be granted; and being revoked, a repurchase of the land does not set up the will again, for that can be done only by republication, and a repurchase bears no analogy to a republication. The will in such case is revoked, not because the devisor intended to revoke, but because he had not *the power to devise,* to (304) grant, for he could not grant that which he had not. The revocation, therefore, in such case is not dependent on free agency; for if in the same conveyance devisor takes back the same estate, yet it is a revocation, which shows that the revocation does not depend on intent. I have used the term revocation in deference to authority, but it is rather an ademption, and, therefore, I have not noticed the marriage settlement; for no question growing out of it can arise upon the probate of a will, and can only arise in contracts about the property devised between the heir and devisee. I, therefore, think that the testatrix, being unmarried at the time of making her will and at the time of her death, the will is a good one, that is, not revoked. For these reasons I am of opinion that a new trial should be granted.

Taylor, C. J., *dissentiente:* Whether the will of a woman is revoked by her subsequent marriage is a question which does not seem to be considered as settled by any series of adjudications, and on which I must be guided by the best light I can obtain. The law is thus far certain, that a woman's marriage alone will be a countermand of her will if she dies in her husband's lifetime. Coke's Rep., 41. The reasons given in that case by the Court were that the making a will is but the inception of it, and it does not take effect till the death of the devisor; but it would be against the nature of the will to be so absolute that he who makes it, being of good and perfect memory, cannot countermand it; and, therefore, the taking of a husband shall be a countermand at law. (2) That it would be mischievous to women if their wills after their marriage were to stand irrevocable. And this they must be, unless the marriage was a revocation; for the law will neither allow a will to be made nor revoked by a *feme covert,* because both might then be done by the constraint and coercion of the husband. In the argument of that case a *dictum* of *Manwood* was cited from Plowd., 343, that if a

feme sole make her will on 1 May and give land thereby, and (305)
afterwards on 10 May she takes husband, who dies on 20 May,
and the woman dies on the 30th, the devise is good, for it could not take effect until her death, at which time she was *discovert,* as she was at the time of making her will, and the intermarriage shall not countermand that which is of no effect in the lifetime of her husband, which proposition was not denied. But is it not an answer to this that the very nature of a will requires that it should be ambulatory and within the power of the testator to revoke at any time during his life? It was said in Coke's Rep. that it is against the nature of a will to be so absolute that he who makes it cannot revoke it. Now, a woman by marrying disables herself from making any other will, or altering or revoking the old one; so that the marriage destroys the *essential* qualities of a will made before, and must, therefore, in consistency of reason, render it void. In 2 P. Wms., 524, the chancellor says that a woman's marriage alone was a revocation of her will; and in 2 Bl., 449, the same proposition is laid down in the same unqualified manner; but, as both these opinions are founded upon the case in Coke, they ought perhaps in fairness to be restricted to the case of the woman dying during coverture. There is no positive opinion pronounced on the question in *Doe v. Staples,* 2 Term, 684, but the language used by the Chief Justice strongly indicates that, in his opinion, a will revoked by the marriage of a woman would not be restored by the wife's surviving the husband. His words are: "The will of a woman made before coverture ceases to be her will afterwards, because it is of the essence of a will that it should be valid during the remainder of the testator's life. Therefore, generally speaking, the will of a woman ceases to have any operation after she becomes covert." He does not say, "during the coverture" nor does he add, "if she dies during coverture." The reason he gives for the revocation ex-
cludes the implication of revival by the death of the husband; for (306)
if it be essential to a will that it should be always valid, which
it evidently is not during coverture, because not revocable, it follows that marrage works a total destruction of the instrument. The *dictum* of *Manwood* is cited 4 Cruise, 105, who also refers to 2 Brown, 534; but what is said in the latter case extends the doctrine no farther than the case in Coke, viz., that a will is revoked by the subsequent marriage; and I incline to think that the case in Brown was quoted, not in support of *Manwood's dictum,* but to open the subject more fully to the reader. In Gilbert's Law of Devises and Revocations the case is cited from Coke as containing the law on the question, and no notice is taken of Plowden, which, in a writer of so much judgment, would scarcely have happened if he believed that a will was revived by the death of the husband before the wife. He reasons with his usual strength that the will is counter-

manded by the marriage, lest she should be influenced by her husband after the coverture to revoke or let it stand, as it best answered his interest, and if he found it his interest to keep it on foot there it is presumptive evidence he would not suffer her to revoke it, which is contrary to the nature of wills, and which are ambulatory till the testator's death. Another writer on the subject lays down the rule to be that the subsequent marriage of a single woman shall revoke it, nor shall it be revived by the death of the husband. Toller, 10. Two other writers of reputation who have lately examined the subject conclude that the weight of authority as well as principle seems to be against considering a will revoked by marriage as restored to its operation by the death of the husband before her. 1 Roberts on Wills, 326; Roper on Rev., 18. The *dictum* of *Manwood* is stated only by counsel in arguing, and, though not denied, is not of equal authority with a decision on the very point, and this was made in *Mr. Lewis's case,* viz., that a will made by a (307) woman before marriage is so totally revoked by her marriage that it cannot revive on the subsequent death of her husband. 4 Burn's Eccl. Law, ch. 47. This decision is entitled to much respect, on account of its taking place in the Court of Delegates, which is a supreme court of appeals in testamentary questions, and is composed of an equal number of common law judges and of persons skilled in the civil and canon laws. Upon the strength of this case, and the other opinions of learned men which have been noticed, I feel bound to decide that the will in this case was revoked by the marriage.

The next question is as to the republication. By the act of 1784, no provision was made requiring the revocation of a devise to be in writing, and the decisions of the Court were that a revocation by parol was valid. To avoid the mischief likely to be produced by setting up such revocations, the act of 1819 was passed, which is nearly a transcript of section 6 of the Statute of Frauds and Perjuries, adapting it to the law previously in force here for the execution of wills. Since this act, devises of land can only be revoked by some other will or codicil in writing, or by canceling, etc. Nor can a will of land once revoked be republished by parol evidence; but, with respect to personal estates, the common law does not seem to have undergone any alteration in England, and they may still be republished by parol. There is, however, a difference between our act of Assembly, relative to the revocation of wills of personal estates, and the Statute of Fraud and Perjuries. By the latter a will of personalty in writing may be repealed by a nuncupative will, if it be committed to writing in the testator's life, and afterwards read to him, and allowed and proved so to be by three witnesses at least. Section 22. But by our act no will in writing, passing a greater estate than £100, shall be revocable otherwise than by some other will or codicil, which is sufficient in law to pass a personal estate of greater value than £100. A question would then arise, whether a will of personals which cannot be revoked but by one of equal solemnity can, after a revocation, be republished by parol. (308) This is worthy of consideration; but as this case does not state the fact that the will did pass a personal property of greater value than £100, the question is not directly presented. Therefore, upon the facts as stated, my opinion is that the will is republished as to the personal estate.

PER CURIAM. New trial.

WILLIAMS v. AVERITT AND OTHERS.—From Washington.

It is altogether descretionary with a judge below to receive further testimony after the argument of a case to the jury, and this Court will not, in general, disturb the exercise of such discretion; but in a case in which the rejection of further testimony below produced peculiar hardship, and was founded on the authority of a prior case similar in its facts, in which the rule as to discretion was not correctly laid down, and in which it had been held imperative on the judge to reject the testimony, this Court granted a new trial, because the prior case had prevented the exerrise of any judicial discretion in this instance.

TRESPASS for beating a slave, the property of the plaintiff.

On the trail below the plaintiff proved the beating, and defendants said they had no testimony and disclosed no ground of defense. The case was put to the jury, and argued by the plaintiff's counsel as a question involving solely an inquiry into the amount of damages; and after his argument, the defendants' counsel objected that the plaintiff had neither shown property or possession in the slave, and in argument insisted on this as a defense. The counsel for the plaintiff then moved that he might be allowed to introduce one of the witnesses before examined, by whom he could prove an undisputed title to and (309) possession of the slave in the plaintiff, and that neither the defendants nor any other person claimed title or possession against the plaintiff. The witness on his examination had not been asked any question as to title, property, or possession. The court refused to allow the witness to be examined to that point, and the plaintiff submitted to a nonsuit. The case stood before this Court on a rule to show cause why a new trial should not be granted.

Hogg in support of the rule.
Ruffin contra.

HALL, J. It is evident that the merits of this case were not before the jury, and it is more than likely that the decision in *Kelly v. Goodbread,* 4 N. C., 468, was the cause of it. It is very true, as is (310) said in that case, that permission to receive testimony will always be granted or withheld according to the nature of the action, the conduct of the parties, and the necessity of receiving further evidence for the advancement of justice. In that case it might be said that it was a hard and penal action, but nothing is alleged against the demeanor and conduct of the counsel, and as the law gave the action, the evidence offered to be given was indispensable for its support. For the same reason, the counsel for the plaintiff could have had no reason for withholding it. It was owing, no doubt, I think, to an oversight, of which those most attentive will sometimes be guilty. I confess I am not altogether satisfied with that case. In this case, which is very much like it, the attention of the parties ligitant seems to have been called to the main point in dispute, namely, the abuse which it was alleged the negro received, the counsel for the plaintiff supposing that title in the plaintiff was admitted or not disputed. Nothing is alleged against the fair conduct of the counsel of the plaintiff. As the testimony as to title was all important to support the action, there should have been no inducement to keep it back. It must be attributed to inattenion. But the loss of the suit is too great a penalty to be inflicted for it, even on the counsel. But this is not all; it spends its force upon the innocent client, at whose door there rested no fault. I attribute no blame to the defendant's counsel when I say that it is more than likely that the objection would have been made before the plaintiff's counsel made their opening speech, had they not waited until after it was made for the purpose of using it as a barrier against the introduction of testimony which the plaintiff's counsel had it in his power to offer. (I cannot bring myself to doubt but that the rule for a new trial ought to be made absolute, and I do it with the less regret because I think the error was the consequence of one committed in this Court, for which I am (311) as reprehensible as anybody else.) I cannot see that *Armstrong v. Wright,* 8 N. C., 93, has any direct bearing upon this case. In *Parish v. Fite,* 6 N. C., 258, evidence was received after the jury had retired from the bar under peculiar circumstances. At the same time that I say that a new trial ought to be granted in this case for the reason before given, namely, that the judge was influenced by the case of *Kelly v. Goodbread, supra,* I wish it distinctly understood that I would not be for granting a new trial had the decision in that case never been made; because I hold that it is altogether discretionary with the presiding judge to receive testimony in such cases or not. He will be governed by many circumstances which it is not in the power of this

Court duly to appreciate. The objection I have to the decision in *Kelly v. Goodbread* is that the Court undertook to decide that the judge in that case had done right in rejecting the evidence, when I think they ought to have said it was discretionary with the judge to reject it or not, as appeared to him to be right. For that reason I am for granting a new trial in this case, which I would not do did I not fear that case was considered by the judge as imperative when he rejected the evidence in this case.

The CHIEF JUSTICE concurred.

HENDERSON, J., dissented, but gave no reason.

PER CURIAM. New trial.

Cited: S. v. Rash, 34 N. C., 386.

HARRIS AND OTHERS v. COLTRAINE.

When a party appeals from the decision of the county court laying off a road over his lands, and the Superior Court lays it off as the appellant wishes, the appellant shall not pay the costs of the petition.

APPEAL at RANDOLPH from *Norwood, J.,* giving costs against the defendant under the following circumstances:

Harris and others were petitioners to the county court of Randolph to grant to them the privilege of making and keeping up a road as a public highway in the county. A jury was directed to view and lay off the road as prayed for, and assess the damages which might accrue to the owners of the land over which it might pass, and to report. This jury laid off the road so as to intersect diagonally the defendant's plantation, and assessed his damages at $12.50. When the jury reported, the defendant opposed unsuccessfully the confirmation of the proceedings of the jury, and appealed to the Superior Court. In the Superior Court the report was set aside, and a new jury ordered to view and lay off the road, who followed the road as laid off by the first jury, and assessed defendant's damage to $20. Upon the return of this jury it appeared satisfactorily to the court that unnecessary injury was done to the defendant's inclosures by the road as laid out, and that it might be made between the points desired without an increase in distance of more than two rods by touching defendant's lines without passing through the inclosures; whereupon a third jury was ordered to lay out the road with as little prejudice as possible to inclosures.

The report of this jury was not opposed by the defendant, and was confirmed, and the court gave judgment that the petitioners should recover their cost.

Haywood for appellant.

(313) HALL, J. By the act of 1813, New Rev., ch. 862, an appeal is given to any person who may be dissatisfied with the judgment of the county court, on a petition filed for the purpose of having a new road laid out, and the appeal is subject to the same rules and regulations as appeals are subject to in other cases from the county to the Superior Courts.

In this case the judgment of the Superior Court was very different from that given by the county court. The road established merely touched the line of the defendant, instead of going through his land; and to have the road laid out in this way was the object of the appeal by the defendant. And in that object he has succeeded. Therefore, I think he ought not to be subjected to costs, but the judgment of the Superior Court ought to be reversed, and the costs paid by the petitioners.

PER CURIAM. Reversed.

LANGLEY v. LANE.

To a *sci. fa.* against bail it was pleaded that the principal had been taken by a *ca. sa.*, and had availed himself of the act of 1820 for the relief of honest debtors, and had been legally discharged. The plea was held bad on general demurrer, because it did not show the court's jurisdiction in the discharge, nor did it show that it was during the continuance of the act of 1820, nor did it specify distinctly the kind of discharge relied on, which under a *ca. sa.* might have been in two modes. It was also held bad because it did not show that the creditor had notice.

APPEAL from *Norwood, J.,* at RANDOLPH.

Sci. fa. against bail. The only question involved in this case arose upon a plea by the bail and demurrer thereto.

The bail pleaded that the principal, since the contracting and existence of the debt for which he was sued and for which defendant had become bail, had been taken upon several writs of *ca. sa.* at the instance of Gilbert Roy and others; and had, since the contracting and existence of said debt, availed himself of the provisions of an act of the General Assembly entitled "An act for the relief of honest debtors," (314) passsed in 1820, and has been legally discharged from the said writs of *ca. sa.* Demurrer and joinder.

The court below, *Norwood, J.*, presiding, sustained the demurrer, and defendant appealed from the judgment rendered according to *sci. fa.*

Haywood for appellee.

TAYLOR, C. J. The defense relied upon in this case must (315) necessarily be pleaded specifically, for there is no provision in the act to authorize the defendant to give it in evidence on the general issue. Although the ancient strictness of pelading is dispensed with in our practice, yet when the defects of a plea are submitted to the consideration of the court upon a demurrer, they can be decided on only acccording to the principles and rules of pleadings, and these are less rigorous when applied to a plea of this sort than to most others; for if enough is set forth in the plea to show that the court had jurisdiction for the subject-matter, and that they discharged the insolvent, everything will be intended in support of their judgment; and they will be presumed to have judged right, unless the contrary appears from the record. But this plea is substantially defective in not setting forth matter sufficient to show that the court could entertain jurisdiction of the subject. Laws 1820, ch. 1067, authorizes a discharge as an insolvent only in those cases, wherein the defendant is arrested after 1 January, 1821, and as this act was repealed at the ensuing session of the Legislature, no person could be properly discharged but during the time while it continued in force. The plea only states that the principal was discharged since the contracting and existence of the debt sued for; but it ought to be distinctly set forth that he was arrested and discharged at a period while the act was in force; otherwise we cannot perceive that the court had any jurisdiction of the matter. If this essential circumstance appeared in the plea; it would be unnecessary to state the other facts leading to the discharge, for we should be bound to presume that in ordering the discharge the court acted properly. It is a rule in pleading that every plea must be so pleaded as to be capable of trial, and, (316) therefore, must consist of matter of fact, the existence of which may be tried by a jury or its sufficiency as a defense may be determined by the court on demurrer, or of matter of record which may be tried by the record itself. 1 Chitty, 520. If, therefore, a fact be complicated with matter of law so that it cannot be tried by either court or jury, it is bad. The plea states that he was legally discharged from the arrest; but this cannot be tried by the jury, nor can the court determine whether he in fact was discharged, and the plea should have stated the material facts which preceded the discharge. The plea is also exceptionable in not specifying distinctly the discharge relied upon, for the act makes it lawful for the sheriff to discharge from the *ca. sa.* upon a bond being tendered (section 1), which would be a legal discharge in addition to the one under section 4, upon the oath being administered. As it is a natural presumption that the party pleading will make as favorable a statement as possible for himself, it is a rule of construction that a plea which has two intendments shall be taken most strongly against the defendant. Co. Lit., 303b. Without noticing the other defects in the plea, it appears to me that these are so substantial as to be availed of on general demurrer, which ought, therefore, to be sustained and judgment rendered for the planitiff.

HALL, J., assented.

HENDERSON, J. After making every allowance growing out of our loose manner of pleading, which we are almost compelled to make in order to reach the justice of the case, I believe this plea cannot be supported; for as every *fact* necesssary to create the charge must be *substantially* stated in the declaration, so the plea must in substance contain every fact necessary to create or form *the discharge.* The defect is that the plea does not state that this creditor had notice. Possi-
(317) bly every other defect might be gotten over. In strictness the plea should state when and show how he was discharged; *the time when,* that it might be perceived that it was at a period when the act of 1820 was in force, for it was repealed in 1821; and *the manner how,* that the Court might see, by comparing it with the provisions of the act, that it was within these provisions. But it only says that he was duly discharged under the act. This mode of pleading draws the examination of the law from the court to the jury, but upon the trial of the issue in supporting the averment *duly discharged* the points would come under examination, and the court could instruct the jury upon the law of the case. But, sitting in a court of original jurisdiction, I would prefer awarding a repleader that the facts might be stated; but this Court, as a revising court, cannot award one, that being matter of discretion; and we have no control over the discretion of the court below; we must take the record as we find it. The want of this power might possibly induce the Court to support the plea if there were no other defects. But I cannot see how the want of notice can be gotten over; for the principal may be very properly and duly discharged from an imprisonment at the instance of another creditor to whom he had given notice, and yet the discharge affect not the rights of this creditor. For on that fact, to wit, notice, depends the efficacy of the discharge as to this creditor. By the express provisions of the act the plea may, therefore, be true in every part, and the utmost extent be given to the meaning of the words duly discharged under the act, and yet not in the least affect the rights of this

creditor. If the fact be that he had notice, the defendant should have moved in the court below to be permitted to amend his plea to replead, and leave would have been granted, even after argument of the demurrer upon terms, or at any time while the record was under the control of the court. The demurrer must be sustained, however reluctantly, and judgment given for the plaintiff. (318)

PER CURIAM. Affirmed.

THOMPSON v. HODGES.

1. Witnesses should swear to their attendance at each term, and the ticket should state the number of days attendance at each term.
2. A witness who attends court without a subpœna to him is not entitled to prove his attendance so as to charge the losing party with the amount of his witness ticket.

HAYWOOD produced a notice to the plaintiff of an intended motion by defendant for a rule to show cause wherefore there should not be a new taxation of costs in this case. It was an ejectment in which, at the last term, there was a judgment for the plaintiff, *ante,* 51; and it appeared that the clerk had taxed the defendant with the costs of several of the plaintiffs' witnesses who had proved their attendance by tickets obtained on oath without specifying the particular *term* or *terms* at which they attended, and also without setting out the number of days attendance at *each* court.

It also appeared that defendant was taxed with the costs of one of plaintiff's witnesses for whom no subpœna appeared among the records below.

After argument by Haywood, the court granted the rule; and afterwards made it absolute, ordering the clerk to expunge from the bill of costs such of plaintiff's witness tickets as were liable to the first objection; and to issue a notice to the witness for whom no subpœna appeared, remarking that he ought to have an opportunity of accounting for the subpœna if any existed, and that if he had attended the court as a witness without having been summoned, his tickets must be expunged also.

PER CURIAM. Motion allowed.

Cited: Belden v. Snead, 84 N. C., 245; *Stern v. Herren,* 101 N. C., 518.

(319)

TYRRELL AND ALEXANDER v. LOGAN.

The act of 1793 which gives jurisdiction in regard to vacating grants, does not authorize the courts to interfere with mesne conveyances from one man to another; therefore, a petition to vacate a grant, brought against a person in possession by purchase from the original grantee, when such grantee was not before the court, was dismissed with costs.

PETITION to *vacate a grant,* before *Paxton, J.,* at RUTHERFORD.

The petitioners set forth that on 5 June, 1817, they entered a tract of land in Rutherford County, and on 18 November, 1818, obtained a grant for the same; but that one David Miller, late entry taker of Rutherford, made an entry in his own office for the land, or a part thereof, without having made any entry before a justice of the peace for the county, and without any justice of the peace making a return to the next court of pleas and quarter sessions of such entry; and that there was no entry, either on the record of the county court or on the entry taker's books, that Miller's entry ever was inserted on the records of the court by direction of the court; that Miller had procured a grant to issue upon his entry by means of false suggestions; that Logan, the defendant, was in possession claiming under Miller's grant; and prayed that Miller's grant might be vacated and they let into the possession.

Logan answered that he was a purchaser for a valuable consideration, without notice of any defect in Miller's title; and that he and those under whom he claimed had been in quiet possession under color of title, within known and visible boundaries, for more than twenty-one years before the filing of the petition, and, therefore, he pleaded the act of 1791 in bar.

A jury before *Paxton, J.,* found that Logan was a fair and *bona fide* purchaser for valuable consideration without notice of any fraud or defect in Miller's title, and that defendant and those under whom (320) he claimed had been in quiet possession for more than twenty-one years, under color of title and within known and visible boundaries before the filing of the petition and before the entry and grant of the petitioners.

The petition was then dismissed with costs, and the petitioners appealed.

Seawell for petitioners.

(321) HALL, J. Miller is not a party to the proceedings now before the Court, and no decree, for that reason, can be made against him. We cannot, therefore, undertake to vacate the grant complained of which the State made to him.

The act of 1793, which gave this Court jurisdiction in regard to grants, does not give it jurisdiction with regard to mesne conveyances from one man to another. Therefore, we have no power to disturb the conveyances made to Logan and to those under whom he claims. Whatever title he may have by possession under color of those mesne conveyances we must leave him in the undisturbed possession of. I agree in opinion with the judge in the Superior Court that the petition must be dismissed with costs.

The other judges concurred.

Per Curiam. Affirmed.

Cited: Crow v. Holland, 15 N. C., 418; *Miller v. Twitty,* 20 N. C., 10.

McREE'S HEIRS v. ALEXANDER.

1. Where a defendant has been in possession thirteen years under a grant which was found by a jury to have been obtained with full knowledge of a prior grant for the same land, the second grant will be vacated, notwithstanding the length of time; the act of limitations has no application in such case.
2. Whether possession under the second grant for seven years prior to its being vacated is a good bar in ejectment, *quære*.

Petition to vacate a grant, before *Badger, J.*, at Mecklenburg.

The petitioners set forth that in 1806 the defendant obtained a grant for 70 acres of land, which before the War of the Revolution had been granted to their father, who lived and died possessed of the same, and that the title thereto descended to the petitioners, who were his heirs at law; that these facts were well known to the defendant when he obtained his grant, and, therefore, the petitioners charged that the defendant's grant was obtained by fraud, false suggestions, and contrary to law; and concluded with praying that a *scire facias* might issue to the defendant to show cause why his grant should not be vacated.

The defendant answered that at the time of obtaining his grant he did not know that it had been granted to the father of the petitioners; that he caused the register's office of the county to be searched, and no evidence there appeared to show that the land had been previously patented; that he believed it to be vacant and unappropriated land when he obtained his patent; and, further, that he had now been in actual possession thereof thirteen years, and was advised that he thereby had acquired good title, although it should now appear to have been previously granted.

To so much of the answer as relied on the possession of defendant there was a replication that two of the petitioners were infants and the other a *feme covert.*

(323) A jury found before *Badger, J.,* below that the defendant at the time of making his entry and obtaining his grant had full knowledge of the prior grant to the father of the petitioners; that defendant in the spring of 1808 took actual possession of the land and has continued it ever since; that one of the petitioners in September, 1806, married and hath ever since been a *feme covert;* and that the other petitioners were not infants when defendant obtained his grant.

Judgment of the court that the grant of defendant be vacated, whereupon defendant appealed.

Ruffin for appellant.

(326) HALL, J. The act which gives jurisdiction to the court declares that when it shall appear to the court that a grant had issued against law, or obtained by false suggestions, surprise, or fraud, it shall be lawful for said court to give judgment that such grant be repealed, vacated, and made void.

In this case the jury have expressly found against the answer of the defendant, "that at the time of the defendant making his entry and obtaining his grant he had full knowledge of the prior grant to the father of the petitioners." It follows, of course, that the grant to the defendant was fraudulently obtained, and that it was obtained against law, because it covered land which had been previously appropriated by McRee's grant. It is unnecessary to say anything about a case where the defendant had not notice. But it is objected that the statute of limitations is a bar to his petition. My answer is that the act of 1798 recognizes no time as a bar, nor do I think that the act of 1715 can be used for that purpose. This is not an action to recover the land, nor does the title to it come in issue, though incidentally it may be affected by the judgment given in this case. It is said that if time and possession be not a bar in this case, it cannot be in an ejectment hereafter brought by the petitioners. Whether that will or ought to be the result of the judgment given in this case, I give no opinion.

It is again objected that the act of 1798 was not intended by the Legislature to embrace grants that issued for lands that had been previously granted, but only on grants that irregularly issued for vacant lands. The act in words makes no such distinction, and I think there is no reason why it should, because grants of that description, although invalid at the time of their date, might have the effect to destroy the titles of the first grantees; and they, having paid for the lands, were as much the object of legislative protection as it was to guard against the issuing of grants for vacant lands when the purchase money had not been paid. I think judgment should be entered for the petitioners.

Henderson, J. It is first objected that the act of 1777, the entry law, does not declare such grants as the present to be void, for (327) that the clause in that law declaring all grants issued contrary to the provisions of that act to be void relates exclusively to grants for *vacant* land. The act excludes from entry all lands heretofore granted; and the clause in question declares all grants issued contrary to the provisions of that act to be void. This land had been before that time granted; another grant, for it, under color of the provisions of the act, is contrary to such provisions. I think it, therefore, within the act. But, independent of the act, it is void upon common law principles; for either *suggestio falsi* or *suppressio veri* is sufficient to avoid the grants of the sovereign; and if such maxim is proper in a regal government, where there is a permanent person to take care of sovereign rights, *a fortiori* it is proper in a republican government where there is no such person. This grant being made upon a false suggestion, viz., that the land was vacant, is, therefore void.

The next objection is that it appears that one of the relators is barred of his right to the land by seven years possession thereof by the defendant under the grant. Without deciding whether a possession for seven years or more under a void grant obtained *mala fide* shows such a want of interest in the person who would be otherwise owner as would induce the court to abstain from acting, as doing an act in no way beneficial to the relator, who is therefore considered as an officious intermeddler—without, I say, deciding this, I think the title of the other relators, whose rights are saved by the proviso of the act of limitations, is sufficient for the court to proceed on. And as the *grant cannot be void as to one person and good as to another,* as it *may be good for one thing and void as to another,* it should be repealed, or rather vacated in the whole, leaving the effect of possession under it before (328) vacation to be settled by future adjudications. The defendant has no right to complain that the grant is taken from him, and that he is left to his possession only; for the principle which restrains a court from acting before it appears that the relator has an interest is not from any tenderness to a defendant, but that the court will not be moved to act at the instance of one in no way interested. It is not the defendant's rights that are regarded, but the useless and unnecessary consumption of time. If the State chooses to act, no relator is necessary. The question never arises *cui bono.* She wills it, and the time is her own. I think that the grant should be annulled for all the lands which had been previously granted.

The CHIEF JUSTICE concurred.

PER CURIAM. Affirmed.

Cited: *Hoyle v. Logan,* 15 N. C., 497; *Holland v. Crow,* 34 N. C., 280.

THE GOVERNOR TO THE USE OF PRATT, MOTT AND WILLIAMS v. CARTER AND OTHERS.—From Hertford.

1. When a sheriff levies on realty before personalty, the defendant has perhaps cause of complaint; but as to the plaintiff in the execution, it is no cause of complaint provided he gets his judgment, nor can he charge the sheriff with a breach of official duty.
2. When a sheriff levies on goods sufficient at the time to satisfy an execution, but which before the day of sale depreciate in value, the sheriff is not bound to make good such depreciation.
3. When a sheriff or other officer is charged with breach of duty, his considering the current bank notes of the country as money, and acting upon that basis, without notice not to do so by those concerned, is not a breach of duty.

DEBT on a sheriff's bond against the defendant Carter and his sureties. The breach assigned was that on 26 November, 1818, the plaintiffs issued their writ of *fi. fa.* to the defendant Carter, then sheriff (329) of Hertford, tested on the same day and year and delivered on that day, whereby he was commanded of the goods and chattels, lands and tenements of Howell Jones he should cause to be made the sum of $1,879.20, with interest from 10 June, 1817, and have the same before the justices of Hertford County court on the fourth Monday of February, 1819; and that although Howell Jones had in said county, from 25 November, 1818, to fourth Monday of February, 1819, goods and chattels of the value of $20,000 in his possession, and his own property, yet that the defendant Carter had not raised the money as commanded.

On the part of the plaintiff it was proved below that Howell Jones had, in the county of Hertford, personal property to the amount of $10,000 or $20,000, from 26 November, 1818, until fourth Monday of February, 1819.

The defendants then proved that Carter, on 15 January, 1819, levied the *fi. fa.* of the plaintiffs, together with four others of the same *teste,* on a house and lots and storehouse and stables and a warehouse, which were in the occupation of Howell Jones in the town of Murfreesboro, and also on several slaves in the possession of Jones. All the writs amounted to nearly $5,000, and the plaintiffs' writ was returned on the fourth Monday of February, 1819, indorsed "Forborne by the orders of plaintiffs"; a *venditioni exponas* then issued from February, 1819, returnable the ensuing May, which was returned indorsed "No sale for want of bidders." The defendant Carter then retired from office.

A *venditioni exponas* returnable November, 1819, then issued, on which the successor of Carter made the sum of $1,287.75, which was paid to the plaintiffs; and on another *venditioni exponas,* issuing from November, 1819, to February, 1820, the further sum of $495.22 was made and paid to the plaintiffs. All the property levied on 15 January, 1819, was sold under the last *venditioni exponas;* (330) and it appeared that none of the writs of *fi. fa.* which were levied on 15 January, 1819, were satisfied; the balance due on the *fi. fa.* of plaintiffs, together with interest, was claimed as damages. The defendant then introduced witnesses who swore that the property levied on on 15 January, 1819, was more than sufficient to satisfy the executions if sold at its fair value, but it was uncertain what it would command at a sheriff's sale for specie. One witness testified that William Amis had deposited with an agent bank notes to buy the houses and lots, and that he declined bidding because the property was sold for specie. The amount of these bank notes the witness did not know, but he, the witness, was to buy of Mr. Amis (if he became the purchaser) at the price of $4,500 on a credit. And this witness further swore that property in Murfreesboro declined greatly in value between January and November, 1819.

The plaintiff relied on the sum made by the sale to show that the property levied on was not sufficient in value to pay the executions, and introduced a witness who swore that the levy on 15 January, 1819, was not sufficient; and further, that at that time Howell Jones had, besides the property levied on, goods in a store at Murfreesboro worth between $10,000 and $20,000; that these goods were afterwards levied on by executions issuing from February, May, and August Terms, 1819, and the executions were satisfied. When the property levied on by Carter on 15 January, 1819, was offered for sale by Carter's successor on a *venditioni exponas,* returnable to August, 1819, the agent of the plaintiff directed the sheriff to require specie, and there was no sale for want of bidders. When the property was sold, it was for bank notes at a discount.

On these facts, his Honor charged the jury that it was the (331) duty of the sheriff to levy on personal property before real, and he left it to them to ascertain from the evidence, whether, if the sheriff had levied on the whole of the goods in the store, the plaintiff's debt, with interest, would have been satisfied or not; and further to ascertain whether the levy made on 15 January, 1819, was sufficient to satisfy the executions levied on it; that it was the right of the plaintiffs to demand specie, nor could the sheriff complain of it, as every plaintiff had a right to demand it in payment of his execution, and in this case the sheriff must have known the plaintiffs were northern merchants and not bound to receive bank notes even if he had sold for them. The jury returned a verdict for the plaintiff for the penalty of the bond, to be satisfied by the payment of $396.25, with interest and costs; and the case was here argued on a rule to show cause why a new trial should not be granted.

Gaston in support of the rule.
(333) *Ruffin and Hogg contra.*

TAYLOR, C. J. Every plaintiff is undoubtedly entitled to demand specie, and is not bound to receive bank bills in payment of his judgment. But the greatest injustice would be done if in actions against sheriffs for an insufficient levy the court were not to take notice that the currency of the country is in bank bills; and that where it is not stipulated to the contrary, all persons calculate upon paying and receiving such bills. If, therefore, a sheriff makes a levy upon property which would be adequate were it sold for bank notes, but inadequate were it sold for specie, he cannot in reason be chargeable upon his bond unless previous notice be given him that specie alone will be receivable. The jury should have been instructed to inquire whether the levy were sufficient if the property had been sold for bank notes; and if it was, it would, in my opinion, have discharged the sheriff without previous notice distinctly given that specie alone would be received. Nor is it right that the sheriff should be chargeable with any depreciation occurring to the property during the time that the execution was forborne by the plaintiff; of this fact of forbearance the sheriff's return is *prima facie* evidence, and it should have been taken into consideration by the jury. I think there ought to be a new trial.

HALL, J. The judge in his charge to the jury stated that it was the duty of the sheriff to levy on personal property before real; and it must be taken, I think, that the law was so stated to strengthen the claim of the plaintiff and weaken the ground on which the defendant stood. In a contest between the defendant in the execution and the sheriff, on account of the sheriff having levied on the real instead of (334) the personal property of the defendant, it would be indispensable so to declare the law to be; but between the plaintiff in the execution and the sheriff, such misconduct of the sheriff cannot be examined; it cannot be the ground of complaint or censure; and to have stated it in the present case may have thrown undue weight in the scale against the defendant.

It was very properly left to the jury to ascertain whether the levy on Jones' property, made on 15 January, 1819, was sufficient to satisfy the execution then levied. If it was sufficient I think the defendant ought to be excused, although it afterwards turned out not to be sufficient on account of its depreciation in value. But the judge again leaves it to the jury to ascertain whether "if the sheriff had levied on the whole of the goods in the store, the plaintiff's debt, with interest, would have been satisfied or not." This part of the charge seems to interfere with that which directed them to ascertain "whether the property levied on on 15 January, 1819, was sufficient to satisfy the execution levied on it"; because, although they found that it was sufficient and the defendant thereby excused, yet if they again found that in case he had levied on the whole of the goods in the store the debts with interest might have been satisfied, they must have found a verdict against him on that account, although they had just acquitted him of blame, because the lands and negroes levied upon on 15 January, 1819, were sufficient. I think the rule for a new trial should be made absolute.

HENDERSON, J. The breach assigned is that the sheriff did not levy on property sufficient to satisfy the plaintiff's execution, he having it fully in his power to do so. The levy was made in January; the sale took place the December following, by another officer, under a *venditioni exponas,* the sheriff Carter having gone out of office in May. The sheriff insists that the property levied on was of sufficient (335) value at the time of the levy, but, from decline in price and other causes not within his control, when sold in December the proceeds were insufficient to satisfy the plaintiff's execution. The plaintiff relies upon the proceeds of the sale as the evidence of the value, and also insists upon the specie price as the sole standard. The judge informed the jury "that it was the duty of the sheriff to levy on personal property before he levied on real property, and left it to them to ascertain from the evidence, if the sheriff had levied on the goods in the store, whether the whole debts of the plaintiff in the execution would not have been satisfied, and instructs them to ascertain from the whole evidence whether the property levied on was sufficient on 15 January, 1819, at the time of the levy, to satisfy the executions levied, and that

it was the right of the plaintiff to demand specie, and it was no fraud in the plaintiff's agent to demand specie, nor could the sheriff complain of it, as every plaintiff had a right to demand it in payment of his execution, and in this case the sheriff must have known the plaintiffs were northern merchants and were not bound to receive bank notes, even if he had sold for them." The above is a quotation from the judge's charge, taken from the transcript. I have taken down the words, for I am not certain that I understand in what manner it was intended to, or did, bear upon the case. The first position is certainly correct as applying to a defendant in an execution; he and he only can complain. So far as it affected the parties in this action, it was irrelevant, nor do I see wherefore it was introduced, unless it was to throw on the defendant the responsibility of a loss upon a deferred sale, no matter from what cause the loss arose if the property levied on was not quite of sufficient value to satisfy the execution; and if it stood alone, I would understand it without that qualification, but taken in connection with the real object of their inquiry as pointed out by the
(336) charge, it is but a fair construction to add that qualification to
it; but, even so explained, it has an improper influence on the case, for instead of making the difference in the value of the property (levied on) at the time of such levy and the amount of the execution the measure of the damages (this act being considered by the judge as wrongful), he subjected the sheriff to bear the whole loss arising from the deferred sale, and thus the difference between the actual proceds of such sale and the amount then due on the execution became the measure of the damages. This is the most harmless way in which I can understand it. I am also at a loss how to apply to the case the remark as to the right of creditors requiring payments in specie. It points at two parts of the case. From the evidence it is quite clear that it was a question on the trial who caused the delay in the sale. The defendant contended that the plaintiff did, and introduced the circumstances which took place on the day appointed for the sale on the execution returnable to August, after Carter was out of office. Among other things the defendant proved that the plaintiff's agent, after being pressed by Jones, the defendant in the execution more than once for delay, observed that he could not consent to it, but as he should demand specie he imagined there would be no sale, and insisted that this was evidence from which the jury might infer that the sale was deferred by the act and connivance of the plaintiff's agent, and that he, the sheriff, ought not to be responsbile for any loss occasioned by such delay. Now, if the judge pointed that part of his charge to this circumstance, or, rather, if the jury so understood it, it was an error; for however lawful it might be for the plaintiff to demand specie, it was relevant for the

jury to infer from this act that the plaintiff consented to and connived at a delay. Whether it proved it or not is not for me to say; it was for the jury. But the plaintiff might cause a delay by a lawful as well as by an unlawful act, which the defendant did not controvert at all. All that he required was that the consequences of the plaintiff's (337) act (and whether it was the plaintiff's act the jury were to judge) should not be thrown upon him. If, therefore, the judge is understood as informing the jury that, as the act was lawful, the consequences of it ought not to be borne by the person who did it, he erred; for one of the best criterions to ascertain whether an act is lawful or unlawful is whether the actor bears himself all the consequences or if they fall upon another; if on the actor alone, it is almost—I believe I may always say always—invariably lawful; if on others, and they are injured, it is most usually unlawful. These two points go to the standard by which the damages should be measured. But this specie payment may point to a more important question. It seems that in ascertaining the value of the property levied on, the plaintiff contended that the specie value was the true criterion; and if the judge meant by that what the property would sell for in specie, after a reasonable notice of the terms, I am not prepared to say that he was wrong. I am fully confident that he would not be wrong if he means a sale for current bank notes, with such a discount on them as would reduce them to their specie value. But if he means such a sum as the property would sell for in actual specie, without giving notice a reasonable time beforehand that such would be the terms of sale, I am fully confident he is wrong; for such rule would place sheriffs entirely at the mercy of the plaintiffs, and they, to save themselves from ruin from fines and forfeitures and civil liabilities, would in every case levy on treble the value of the property or more, and in cases where it was not intended to demand specie, when the sheriff might be easily placed on his guard by only requiring that before he shall be subject to those fines, penalties, forfeitures, and liabilities for breach of duty, the law should require what is consonant with practice and convenience, viz., that (338) notice should be given.

I do not intend to say that bank notes are money, or a tender in payment of debts, but by consent. Nor do I say that a payment in bank notes may be refused without any previous notice to that effect. All that I intend to say is this, that when a sheriff or other officer is charged with a breach of duty in office, his considering the current bank notes of the country as money, and acting upon that basis without notice to the contrary by those concerned, is not a breach of duty. But I do not mean to say that if the sheriff sells for bank notes without notice to sell for specie, that the creditor is bound to take such notes, or that the sheriff is not liable to be sued for the money; but it cannot be considered as a malfeasance in office, or subject him to any fine or penalty, or any action where the grievance is breach of official duty.

I think that, as it is pretty apparent that the jury was misdirected by the judge, there should be a

PER CURIAM. New trial.

Cited: Atkin v. Mooney, 61 N. C., 33; *Purvis v. Jackson,* 69 N. C., 480.

DOE ON DEMISE OF DEVEREUX AND THE STATE BANK v. ROE AND MARSORATTI.—From New Hanover.

The act of 1789, ch. 312, "For the more easy redemption of mortgages," applies in those actions of ejectment only in which the parties stand in their original simple state of mortgagor and mortgagee.

EJECTMENT for a tract of land of 5 acres on the island opposite the town of Wilmington.

The plaintiff gave in evidence a mortgage from Hanson Kelly for the land in dispute, executed to the State Bank of North Carolina, dated 1 August, 1818, to secure the sum of $16,000.

Also, a deed from the State Bank to T. P. Devereux, lessor of (339) the plaintiff, purporting to convey its interest in the aforesaid 5 acres, dated 18 March, 1822.

Also, a certified copy of a deed of bargain and sale, from Hanson Kelly to Marsoratti, the defendant, for the tract of 5 acres, and also for two other acres adjoining the same, and not included in Kelly's mortgage deed to the State Bank. This was dated 31 December, 1818.

Also, a deed from Marsoratti to Burgwin and Reston, conveying one moiety of the premises which had been conveyed by Kelly to Marsoratti, dated August, 1819; a deed from Reston to Burgwin for the same, dated 14 December, 1819, and a deed from Burgwin to Campbell, Holmes, and London, trustees, to secure a debt due the Bank of Cape Fear, dated 15 December, 1819. This deed conveyed much real and personal property, including that which Marsoratti had conveyed to Burgwin and Reston.

The defendant then exhibited the original deed from Hanson Kelly to Marsoratti, dated 31 December, 1818, and proved that Charles J. Wright, who was at that time president of the Wilmington branch of the State Bank (to which the debt was due which the mortgage was given to secure), wrote the deed and became a subscribing witness thereto; and, further, that Marsoratti knew before his purchase from Kelly that the land had been mortgaged by Kelly to the State Bank.

He also proved that the State Bank verbally authorized Kelly to find a purchaser for the 5 acres which he had mortgaged, and to sell the same on a credit for $3,000 (the agreed value of the 5 acres), to be secured by a bond or note satisfactory to the State Bank; and when the sum was so secured, the bank was to relinquish its lien under the mortgage. Marsoratti agreed to give Kelly $4,000 for the lands conveyed in the deed of 31 December, 1818; $1,000 whereof was paid down and $3,000 was to be secured to the State Bank by a good note; and before Marsoratti purchased of Kelly he called on the officers of the State Bank at Wilmington to know upon what terms they would release their
lien upon the 5 acres, and was informed that it should be done (340)
upon Kelly's securing to them the payment of $3,000.

The defendant then offered in evidence resolutions of the State Bank, Wilmington branch, declaring that whenever the proprietors of the steam sawmill should pay $3,000, the bank would relinquish the mortgage made by Kelly, and showing that Burgwin and Reston afterwards offered their note for $3,000, indorsed by Bridges, on renewal of which, when it became due, the bank required another indorser; Burgwin did not give another indorser, but in lieu thereof deposited the notes of other persons as collateral security, to be retained until a satisfactory and unexceptionable note was given.

On 15 October, 1820, the note of Burgwin for $3,000, indorsed by Devereux and C. J. Wright, was offered for discount by Wright at the Wilmington branch of the State Bank, and was discounted, and the proceeds placed to the credit of Wright, and this note was deemed by the bank satisfactory and unexceptionable, and the notes deposited were ordered to be given up to Burgwin. On the morning of 18 April, 1820, C. J. Wright, then president of the bank, came into the banking room, drew a check for $3,000, and, acting officially, directed the clerk to credit Hanson Kelly's account with $3,000, and to charge Wright's account with the same; and after the entries were thus made Wright declared that the State Bank had no longer any interest in the 5 acres of land; that it was extinguished, and that Marsoratti's title thereto was now good and complete. There was no evidence of any payment on the mortgage from Hanson Kelly, except the $3,000 paid by Burgwin's note, which was made long after the time when the money due by the mortgage was payable. The bank executed no formal release of its interest.

Varions questions were made below on these facts, all of which were determined for the plaintiff. The only question here made was
on the act of 1789, ch. 312, N. R. (341)

HALL, J. I think it was the object of the act of 1789, Rev. ch. 312, entitled "An act for the more easy redemption of mortgages," to put it in the power of the courts of law to finally put an end to suits brought under deeds of mortgage against mortgagors as long as the parties thereto stood in their original simple state of mortgagee and mortgagor, and their relation to each other in that respect had not become more complex and encumbered with subsequent arrangements as in the present case. For instance, Kelly became indebted to the branch State Bank, and gave a mortgage on 1 August, 1818, to secure to them the sum of $16,000 for the land in question and other property; this suit is brought for that property, or part of it. What, under the act, is expected to be done? Why, that all the principal money and interest due on such morgage shall be brought into court. This has not been done. But it is said the reason is that Kelly and the bank had entered into new arrangements; that Marsoratti, who claims the island through Kelly, shall have the island provided he pays $3,000 and interest. Be it so. This is a new arrangement between the parties since the mortgage was given, and it is upon such arrangement that the defendants argue that they are entitled to the benefits of this act of Assembly, and not upon the original contract under the mortgage. But I am of opinion that this Court, or the court below, have not cognizance of this second contract under that act of Assembly, evidenced by bank resolutions and the note discounted in the bank in part discharge of Kelly's debt; these are circumstances which the defendant has it in his power to make available, as far as at present appears, in some other way than by this application to have this ejectment dismissed upon his proving that he has paid $3,000 in conformity to the second agreement that he made with the bank. I think we have no authority under that act to incorporate the second agreement (342) of the parties with the first which they made when the mortgage was given, and act upon both. Were we to be led off from the beaten road by this after agreement, there is no certainty where we should stop. Agreement after agreement might present itself, all connected with the original agreement under the mortgage. It has assumed too complex a shape to be adjusted in this action under that act of Assembly.

PER CURIAM. No error.

MOLTON TO THE USE OF MILLER v. HOOKS.—From Duplin.

Where the condition of a bond given upon obtaining a *certiorari* was that the obligor should make his personal appearance, and *abide by and stand to* the judgment of the court, it was *Held,* that these words were equivalent to the words "*perform* the judgment of the court," and imposed on the obligor the payment of the sum recovered against him.

THIS was an action of *debt* on the following bond:

"Know all men by these presents that we, Michael Boney and Charles Hooks, are held and firmly bound unto Thomas Molton, clerk of the Superior Court of the county Duplin, in the sum of $2,500, to the payment of which well and truly to be made we bind ourselves, our heirs, executors, etc."

The condition of this bond was in these words:

"The condition of the above obligation is such that, whereas the above bounden Michael Boney has prayed a stay of the proceedings in a certain matter lately tried in the county court of Duplin, wherein Stephen Miller, senior, is plaintiff and said Michael Boney is defendant; now, in case the said Michael Boney makes his personal appearance before the judge of the Superior Court to be held for the county of Duplin on the fourth Monday of September instant, and then and there *abide by and stand to* the judgment of said court, then the above obligation to be void and of no effect; otherwise, to remain in full force and virtue."

The breaches assigned were: (1) that Michael Boney had not abided by or stood to the judgment of the court rendered in the case of Stephen Miller, senoir, against Michael Boney, nor Charles (343) Hooks for him; (2) that Michael Boney had not abided by or stood to, neither had he paid, satisfied, or performed the judgment of the court rendered in the case of Stephen Miller against Michael Boney, nor had Charles Hooks for him.

On the trial below the plaintiff proved the execution of the bond, and gave in evidence the judgment in the case of *Stephen Miller v. Boney,* rendered at March Term, 1822, of Duplin Superior Court, for $682.99, with $303.37 interest and costs. He also gave in evidence an affidavit made by Boney before his Honor, the Chief Justice of the State, as the ground for a prayer of writs of *certiorari* and *supersedeas,* setting forth that at April term of Duplin County court Stephen Miller, having the promissory note of Boney, procured Boney to accept the service of a writ issued thereon, returnable, as Boney thought, to the succeeding term of the court, promising Boney that all things should be done rightly and justly, and saying that the suit should be conducted in a friendly manner, and under these assurances Boney left the court and went home; apprehending, however, that a payment which was not indorsed on the note might not be allowed, Boney employed an attorney of the court to appear for him, but did not inform him when the writ was returnable. Miller caused the writ to be returned at the same term, and obtained a judgment final by default for the whole amount of the note without allowing the payment, and issued an execution which was levied on Boney's property.

The Chief Justice, on this affidavit, granted his *fiat,* directing the clerk of Duplin Superior Court, upon receiving from Michael Boney bond and security conditioned to abide by and perform the judgment of Duplin Superior Court, to issue a *certiorari* and *supersedeas* for the purpose of bringing up the proceedings from the county court of Duplin, and superseding the execution against said Boney.

(344) The plaintiff then gave in evidence the writs of *certiorari* and *supersedeas* from Duplin Superior Court, which issued in obedience to the *fiat.*

The defendant then proved that Michael Boney was taken on a *ca. sa.* issuing on Miller's judgment, and was regularly discharged under the insolvent laws of North Carolina.

On this evidence a verdict was found for the plaintiff. The defendant moved in arrest of the judgment that the bond declared on contains neither the form nor the substance of bonds required to be given in cases of *certiorari,* nor of the bond ordered to be taken in the fiat of the judge; and that the arrest, imprisonment, and discharge of Michael Boney under the insolvent laws on a *ca. sa.* issuing on Miller's judgment, was a performance of the conditions of the bond, and, further that if the bond is valid, and under the facts of the case the defendant is liable thereon, then the present is not the remedy given by law.

These reasons were overruled and judgment rendered, whereupon defendant appealed.

Gaston for the appellant.
Ruffin and Hogg contra.

TAYLOR, C. J. The recital in the condition of the bond is (347) sufficient to show that the defendant was apprised of the purpose for which it was given, viz., to obtain a stay of the proceedings which had been had against the principal in the county court. The stay was obtained, the cause was reheard in the Superior Court, the judgment affirmed, and the question arising on this record is, whether the words of the condition, viz., "shall make his personal appearance before the judge of the Superior Court, and then and there abide by and stand to the judgment of the court," impose upon the defendant an obligation to pay the amount of the sum recovered Had the bond been made payable to the plaintiff in the judgment, I suppose that, according to the principle of *Rhodes v. Vaughan*, 9 N. C., 167, the bond would have been sufficient, although slightly variant from the words of the act relative to appeal bonds, because the law prescribed the responsibility of the obligors in the bonds taken to prosecute appeals. And, indeed, it has been repeatedly decided that if an appeal bond substantially, though not literally, provided for the objects required by law, it should be supported. This, however, must be considered as a voluntary bond, and must stand or fall by its own strength or weakness. By the words, "make his personal appearance," the parties must have understood that the defendant should attend court by himself or attorney and prosecute the *certiorari*. One of the senses in which the word "abide" is used is "to bear or support the consequences of a thing"; and had it been used (348) without the adverb "by" it might be construed that he would bear the consequences of the judgment rendered in the Superior Court. Succeeded by the adverb, it gives it something of an active signification, and imports not merely that he would suffer or bear the consequences of the judgment, but that he would likewise defend, and support, and maintain it—all partaking of the primary sense of the word, "a firm and steady continuance." A person who shall promise to abide by a judgment would break his promise by refusing to pay it. To "stand to," in common acceptation, signifies to remain fixed in a purpose to abide by a contract or assertion. But in legal parlance it has obtained by long usage, an active and efficient meaning, and imports an act to be done by the party. Thus, if the condition of a bond be "that I shall *stand to* the award of J. S., and he doth award me to pay 20*l*. to W. S. by such a day, and on the day I do tender him the 20*l*., but he doth refuse it," in this case I have sufficiently performed the condition, and the obligation is saved. So again, "if the condition be that I shall *stand to* the award of J. S., and the award that I shall enter a *retraxit* in a suit depending between me and the other party, and I do not so, but am nonsuit, or do discontinue my suit, this is no good performance of the condition." 1 Shep. Touch., 373. Awards and judgments bear so near a resemblance to each other that a bond conditioned to "stand to" one could not reasonably bear a different construction from a bond conditioned to "stand to" the other. When, therefore, I test the signification of the terms used in the condition of this bond, either by their general acceptance in common speech or by their strict technical meaning in the language and understanding of lawyers, I cannot escape from the conviction that they bind the defendant to pay the amount of the judgment; for I find it laid down in the best authorities that although the condition of a bond (349) when it is doubtful shall be taken most favorably for the obligor, for whose advantage it is made, and most strongly against the obligee, yet that a reasonable and equal construction shall be made according to the intention of the parties, *although the words tend to a contrary understanding*. Dyer, 14, 52. My opinion consequently is that the judgment ought to be affirmed.

HALL, J. The act of 1777, New Rev., ch. 15, sec. 75, directs that when appeals are taken from the county to the Superior Courts, bonds shall be given to prosecute such appeal with effect, and to perform the judgment, sentence, or decree of the Superior Court. The act of 1810, New Rev., ch. 793, directs that when *certioraris* are directed to the county courts, the clerk of the court is directed to take security in the same manner and under the same regulations that security is taken in appeals from the county to the Superior Courts. It is to be observed that these acts point out no form in which appeal bonds are to be taken; and if the bond taken is substantially good, it is sufficient. The question is whether the words *abide by and stand to* the judgment, etc., are equivalent to the word *perform* the judgment. The act which required the bond to be given pointed out the liability to which the security was about to subject himself, and he understandingly undertook that the defendant should pay the debt when he undertook that he should abide by and stand to the judgment which should be given. What are the injunctions of the judgment? That the defendant shall pay to the plaintiff so much money; and it cannot be said, as I think, that he abides by and stands to the judgment without doing it. The word "perform" is one of stronger and more active import; but although it is said in the schools that no two words have precisely the same meaning, yet in common life and in common parlance we know there are various words used as substantially meaning the same thing.

It is said the defendant is a security, and the bond should be (350) strictly construed in his favor. It is true he is so, and puts no money in his pocket; but the consideration is that by becoming security he deprived the plaintiff of the judgment he had in the county court, and thereby jeopardized the debt. A loss to one party is equivalent to gain to another.

But it is said that this defendant has stipulated that the defendant shall make his personal appearance, abide by, etc., and that he is bound only as bail for his appearance and not for the debt. In this view of the case the whole burthen of the obligation rests upon the word appearance; and if the defendant is received merely as bail for his appearance, the words *abide by and stand to* the judgment which the court shall give are inoperative. But this construction of the words is contrary to the meaning of the Legislature when they directed security to be taken. But if by any fair construction of the bond we can make it harmonize with their meaning, I think we ought to do so. It is for this reason that I consider the words *abide by and stand to* as more operative than the words *make his personal appearance.* But take the words altogether, that he is to make his personal appearance, abide by and stand to the judgment which the court pronounces, I think their meaning is that he shall perform the judgment. But it is said this bond was not given as the law directs; it should have been given to Miller instead of Molton. That is true; but if the bond was given *bona fide,* as I believe it was, although given to the wrong person, it was given for the same purpose, the same consequences follow. It answered the same purpose in removing the suit by *certiorari* to the Superior Court as if it had been given in any other way. The act of 1818, New Rev., ch. 962, sec. 4, directs, in case of appeals to the Supreme Court, bond shall be taken to *abide* the judgment of the court, and that such bond shall be proceeded on in the same way as in case of appeals from the county to the Superior Court; that is, that the security shall be answerable for the debt, if the defendant does not pay it; so that it appears in this case that the (351) obligatory part of this bond is not so strong as the one under consideration. I am of opinion that judgment should be given for the plaintiff.

HENDERSON, J., *dissentiente*: The words "stand to" mean "not to fly from"; and the words "abide by," to acquiesce in. They import nothing active; they are fully satisfied by inaction. But, like all other words, the representatives of ideas, they may mean something more; but that further meaning must be collected from the context, for in the construction of words, as well when not reduced to writing as when they are, they must all be taken together, and the meaning of one word may be either abridged or enlarged by others. The term "heirs general" is frequently construed "heirs special," or heirs of the body, when by other expressions in the same instrument it appears that they were used in that sense. So the words "stand to and abide by" in bonds or agreements of submission to arbitration may import an obligation to perform the award; that is something active when they are the only words used, as is sometimes the case, although more properly their meaning is referable to the acquiescense in the award promised by or imposed upon the claimant in the submission than to the party who merely resists the claim. But as it is quite clear that from their very nature all submissions to an award impose on the claimant an acquies-

cence in the award in consideration of the performance promised by the adverse party, the very nature of the transaction requires that such exposition should be given to the words; otherwise, it is not the thing which every other part of the transaction declares it to be. The authorites, therefore, which go to show that these words, when solely used in submission to awards, impose an obligation of performance, do not prove that such is the meaning of these words wherever inserted,
(352) uninfluenced by others; but that such meaning may, from the context, be imposed on them when the thing could not be what it professes to be without giving them such meaning. Upon examination of the other parts of this obligation, so far from finding anything by which the natural import of these words can be extended to performance of the judgment of the court, there are strong indications of a contrary intent. The words alluded to are, *shall appear at court,* the whole sentence standing thus: "If the said Michael Boney shall appear at court, stand to and abide by." They are all acts of the same class; the one is conducive to the other. He shall appear at court to show that he flies not from the judgment, and that he acquiesces in it; that the court may have it in its power to make the judgment effectual. But if it is understood as the plaintiff contends, that is, that he shall appear at court, stand to and perform the judgment of the court, two acts are required to be done in which the obligee is not at all interested. It is a matter of no importance to him whether the obligor appears at court or not, whether he stands to the judgment or not; if the money is paid it is all that he can rightly require; for why does the obligee require his presence to compel him to pay the money? He has the security bound that he shall actually do it; not only that he shall place himself in a situation that a payment may be enforced, but he is bound that an actual payment shall be made. To test the correctness of this reasoning, suppose that the obligor had actually paid ŏff the judgment, but had failed to appear at court; in a suit brought on the bond, the defendant pleads such payment or satisfaction; the plaintiff replies that he did not appear at court, if the words of the bond are taken as stated last above, and as the plaintiff contends they should be read, then payment is no discharge, for the obligation imposed a performance of three acts, viz., appearance. standing to, and payment. If taken, therefore, according to this reading, the bond is forfeited, although the judgment was actually
(353) performed. I do not put this case to show that if such were the words of the bond, that payment being the major and containing in itself the minor, would not save the penalty; for upon the strictest rules of law nothing but nominal damages could have been recovered for not appearing at court, as on a covenant to do any other

indifferent act not prejudical or benefical to the plaintiff. But I put the case for the purpose of showing that the obligation would be incongruous, and the bond should not be so read, if it could be read otherwise; much less should it be so read when such reading would be incongruous and enforce unnecessary and superfluous obligations; whereas, if it is read as the defendant contends it should be, by giving the proper meaning to the words, the incongruity would be avoided. Each act is conducive to the other, and in each the obligee would have an interest. And that they would not be incongruous is shown, not by assertion, or even by reasoning, which may mislead, but by authorities of the highest kind; I mean the form of the bail bonds of our country, both in civil and criminal cases, and recognizances of bail in England in civil and criminal courts also. There the words are shall appear, and answer, and stand to, and abide by. No incongruity can be attributed to such high authority; which also proves that the words do not import an obligation of performance, for we all know that bail are not bound that the principal shall perform the judgment of the court. Appearance and acquiescence is all the obligation which such words impose. But we are met by what was considered an unanswerable authority, viz., that the words *abide by* are the only obligatory words which are used in directing bonds to be given upon appeals from the Superior Courts to this Court, and that in such bonds these words alone impose an obligation of performance. (See the act of 1818 establishing this Court.) To my mind, this is a strong authority the other way. It is not denied that words may be explained by the context, that they may be abridged or enlarged thereby. (354) Heir general is frequently read heir special; the words children read heirs, when by something in the same writing it appears that they were used in that sense. So, here, the Legislature having declared that the same remedy should be had upon appeal bonds to this Court as are required by prior laws upon appeal bonds from the county to the Superior Court, and such bonds imposing an actual performance on the obligors, and the acts of Assembly having directed judgments to be entered against them for the full amount of the recovery, it is quite evident that the Legislature in this act used the words "abide by" as imposing an obligation of actual performance, for the same remedy implies the same rights, and from the context we arrive at the meaning of the words "abide by." But this is a solitary instance, as far as I know, and I presume as far as the counsel for the plaintiff knows, in which the Legislature has used the words to import an obligation of actual performance; and an occasion to express that idea must have very often occured in that body since it first began to legislate, and a much longer period has passed since England had a parliament, and I do not know of a single instance where they used it in that sense. To be sure, this is negative authority; but so many negatives amount almost to positive authority. I think, also, that this construction meets the real justice of the case; for when the same words are used which are used in bail bonds, a transaction of almost daily occurrence and with which the people are conversant, it is highly reasonable to presume that the obligors thought they were incurring the obligations of bail only, as the same words were used in bail bonds. I therefore think there should be a new trial.

PER CURIAM. Affirmed.

EX PARTE THOMPSON.

Foreigners not naturalized cannot be licensed as attorneys in North Carolina.

APPLICATION having been made to the Court by Mr. Thompson and Mr. Strange, who were foreigners, not naturalized, for license to practice as attorneys in North Carolina, the Court doubted the propriety of granting them the license asked, and having expressed a wish to hear a discussion of the subject, the point was argued by (355)

Gaston and Ruffin for the applicants.
Attorney-General and Mr. Seawell contra.

(359) TAYLOR, C. J. This is an application on behalf of two gentlemen to be admitted to the bar of this State, both of who are aliens; one, it is understood, is now and has been for some time resident in South Carolina, and the abode of the other has been in this State for a year past; but both have signified their intention to renounce their allegiance to their present sovereign and to become naturalized citizens according to the laws of the United States. Their claim to an examination has been asserted on the ground of right; and if the act of 1777 shall, according to the usual rules of interpretation, appear to convey a peremptory direction to the Court to examine them, we can only yield obedience to it, however striking might be the mischief and impolicy of such a course of legislation. It is very true, as argued, that the act referred to does not in terms prescribe citizenship as one of the qualifications for admission to the bar; but neither does it profess to enumerate all the qualifications; nor does it appear to be mandatory to the judges to admit upon the applicant's possessing the

qualifications enumerated. The words are, "That no person (360) coming into this State from any other State, or from any foreign country, with an intention to practice the law, shall by the said judges be admitted to practice as an attorney, unless," etc. The last sentence of the clause provides: "That upon such qualification had, and oath taken, they *may* act as attorneys during their good behavior." That this act was predicated upon the assumption that the applicants should be citizens of the State, according to the existing laws, when they applied, seems plain from the provisions of a law passed at the very same session, according to which all persons above 16 years of age, after a week's residence in the State, were compellable to take the oath of allegiance. The neglect or refusal to do this subjected the party to a compulsory departure for the West Indies or Europe; or, if permitted by the county court to remain in the State, he was adjudged incapable and disabled in law to have, occupy or enjoy any office, appointment, *license,* or election of trust or profit, civil or military, within the State, and shall not be capable of being elected to or aiding by their votes to elect another to be member of Assembly, and shall not, by themselves or deputy, attorney or trustee, execute any such office, trust or appointment, and shall be disabled to prosecute any suit at law or equity, or to be guardians, executors or administrators; with a variety of other disqualifications enumerated in the act of 1777, secs. 8 and 9, Iredell's Revisal. Thus it appears that a simultaneous legislative act, with that regulating the admission of attorneys, disqualified all persons from holding or obtaining a *license* who either refused or neglected to become citizens according to such ceremonies as the pressure of the times enabled the Legislature to prescribe. In looking at the extent and severity of these disqualifications, carried far beyond what the common law annexes to alienism, it is but an act of common justice to the Legislature of that day to connect with our reviews the circumstances under which the enactments were made; for however justly they might be considered as subversive of the customary law of nations if (361) passed in a time of tranquillity, yet the new government had in truth more to dread from the disaffected inhabitants within the bosom of the country, from those who have owed a common allegiance to the same sovereign, than from aliens in the ordinary sense of the word; and it was an object of vital importance to the great experiment then about to be made that those who were hostile to the new order of things should be deprived of all participation and sinister influence in its progress. Under general principles, however, my opinion is that none but citizens are contemplated in the first act, and that its necessary and genuine interpretation is to exclude aliens. The middle state in which the common law places a denizen is unknown here, except it exist in the right to hold lands immediately upon taking the oath of allegiance. The State may prescribe the terms upon which an alien may be enabled to hold lands within the limits of the State, and that part of the Constitution of the State must still retain its force (sec. 30), while the latter branch of the clause, prescribing the terms of citizenship is annulled by the Constitution of the United States and the naturalization laws passed in pursuance thereof. With this single exception, all persons (I mean to speak only of free white persons) residing here are either citizens or aliens; the former, whether native or naturalized, being entitled to equal rights, with the exception of eligibility to the office of President, which is confined to those who were citizens at the adoption of the Constitution of the United States. Aliens, on the other hand, owe only a temporary allegiance, and have no rights but such as are deducible from the law of nations, the most important of which are defined and incorporated in the municipal codes of most civilized countries, or such as are secured by treaties between different nations. An alien may claim to live in a foreign country without injury or molestation; but he cannot justly assert the municipal rights (362) and social privileges of a natural citizen. It is laid down by writers on the civil law that whenever a foreigner travels out of his own country he can only claim the benefit of the law of nations, having no right to the law or privileges of any particular place. Some discrimination is made in the law of every country between citizens and aliens, and though the advance of commerce and civilization has everywhere mitigated its ancient severity, yet there is not at the present day any nation in which the restraints on aliens are milder or less vexatious than in this, none in which a plenary admission to the rights of citizenship may be more easily obtained. No conditions are required which the safety of the Republic does not demand, and which may not be performed by all, rich or poor, who are likely to become useful members of society.

Whatever discretion resides in the judges relative to the admission of attorneys ought to be exercised with a view to the advantage and security of the suitors in the several courts; for to them the license is a guarantee that in the opinion of the magistrates signing it the licentiate is politically, not less than legally and morally, qualified to transact their business. Yet in the event of a war being declared between the United States and any foreign nation or government, the authority under which he practices would not protect the subject of such government not actually naturalized "from being apprehended, restrained, secured, and removed as an alien enemy," to the great injury, possibly the ruin, of numerous clients. 3 Laws U. S., 84. Even the judges of the State themselves might become the instruments of such apprehension and removal out of the State under the second section of the same law. No one should be presented to the public under the panoply of such a license against whom an injured suitor would not have the full benefit of such legal remedy as the laws of the State provide in the event of fraudulent or negligent practice. Act of 1743, ch. 37, R. C. N. But such a suit brought against an alien attorney for such a (363) cause might if the matter in dispute were of sufficient amount, be removed to the Circuit Court of the United States, and by possibility thence to the Supreme Court of the same Government. There is no profession relative to which the public good more imperiously requires that its members should duly appreciate and honestly maintain the freedom, the purity, and the genuine spirit of our political institutions. These are so blended and interwoven with the civil rights of the citizen, they present themselves in such an infinity of relations as additional abutments to the several charters of property and personal security, that it is difficult to conceive how a professional advocate, owing foreign allegiance and cherishing alien prejudices, can usefully vindicate principles in the abhorrence of which he may have been nurtured; how, on many important occasions, the most brilliant forensic talent can be successfully exerted, unless they are sustained and inspired by an ardent patriotism. The excellence of every human system of laws consists as much in their administration and practice as in the theory itself. Viewing the profession of the law as the source from which the superior judicial magistrates must be derived, and from which a large proportion of enlightened and efficient public officers is usually selected, every one must naturally feel solicitous that it should not fall into such hands as would lower it in the National opinion. It would be diffictult to avoid this consequence if aliens were entitled to admission, for legal acquirements and private worth may subsist with inveterate prejudices against the principles of our Government. In such an arrangement society would cease to derive that benefit from the profession which it now affords, by supplying a continual succession of men qualified and worthy to preside in the courts of justice. No longer a nursery in which merit is trained under the directing hand of experience and qualified to render manly and essential services to the community, the legal profession, "in its nature the *noblest* (364) and *most beneficial* to mankind, in its abuse and debasement the *most sordid* and *pernicious*," would sink into a mere mercenary instrument, without sympathy in the public prosperity and without hold on the public confidence.

PER CURIAM. Application denied.

Cited: In re Applicants for License, 143 N. C., 9, 32.

EURE AND WIFE v. PITTMAN.—From Halifax.

1. To entitle a party to give parol evidence of the contents or execution of a will alleged to have been destroyed, where there is not sufficient evidence to warrant the conclusion of its actual destruction, the party must show that he has made diligent inquiry and search after the will in the place where it would most probably be found if in existence.

2. It is the province of the *court*, in the first instance, to say whether there is sufficient proof of the loss or destruction of the paper, or whether sufficient inquiry has been made to let in parol evidence.

THE plaintiffs offered for probate a paper-writing as the last will and testament of Edward Crowell, deceased; there was a *caveat* in the county court, and after trial there it was carried by appeal to the Superior Court. The wife of the legatee named in the paper (Thomas W. Crowell, son of Edward) is now one of the plaintiffs, having since the death of her first husband married Eure; the defendant is the other child of Edward Crowell, who, at her father's death, was the wife of one Pittman.

The writing offered was proved to be the handwriting of Edward Crowell, all and every part of it, by four credible witnesses, who deposed that they were well acquainted with his handwriting. One of these witnesses deposed that the paper was found by him in a small drawer of the desk of Edward Crowell, in his house, with other papers and money; the drawer had a lock, but was unlocked when this (365) paper was found.

The defendant contended that this will was revoked by a subsequent will made by Edward Crowell, and that the last will had been destroyed or suppressed by the plaintiffs or by those under whom they derived an interest, or by some other person under their advice and procurement, and offered to prove the same by the subscribing witnesses to the last will. This was objected to by the plaintiffs, because they had no notice to produce the will. The court was of opinion that if the plaintiffs had the last will or had been the cause of its suppression, or claimed under those who had, then such conduct would be illegal and fraudulent, and the defendant was not bound to give notice to produce it in order to be let into parol proof of its contents. The plaintiffs further objected to any parol proof of the contents of a lost or suppressed will, before the fact of loss or suppression had been established by a court of competent jurisdiction. This objection was overruled.

The defendant then called as witnesses Jacob Pope and his daughter. Pope deposed that Edward Crowell died on Wednesday. On the preceding Sunday, 26 May, 1820, he came to the house of Pope with a paper-writing in his hand, having his name signed to it, and said that it was his last will and testament, and requested Pope to attest it; Pope did subscribe it as a witness in Crowell's presence; Crowell then asked if there was no other person in the house capable of attesting it, and was informed that Miss Pope was in an adjoining room; Pope went for his daughter, brought her to Crowell, and told her that Crowell wished her to be a witness to his will; this declaration was in Crowell's presence and hearing. She took the paper, and when about to sign it Crowell requested her to be careful and subscribe her name in the proper place. Miss Pope stated that she signed the paper as a witness, and confirmed her father's statement as to the circumstances attending her attestation. Neither of these witnesses read the will or heard it read, nor did Crowell say that the signature was his, or that he had directed it to be placed there. After they had (366) witnessed it, Crowell carried it away with him.

The defendant then introduced another witness, who swore that Crowell, on 27 May, 1820, placed the last mentioned will in the possession of one Rebecca Tillery, who was the sister of Mrs. Eure, one of the plaintiffs, and who resided at the house of Mrs. Eure's then husband, Thomas W. Crowell, only son of the testator. Edward Crowell shot himself on Wednesday, 29 May, 1820, and shortly after, on the same day, Thmoas W. Crowell cut his throat and died. When it was reported that Edward Crowell was dead, the witness and Mrs. Eure, the plaintiff, and her sister, Rebecca Tillery, went to E. Crowell's house, but did not go in; while there the defendant and her husband Pittman arrived, and with others entered the house, and in the after part of the day witness returned to E. Crowell's from the house of Thomas, which was distant about 300 yards, and there found the defendant and others. Rebecca Tillery was summoned by both parties, but did not appear.

The court charged the jury that if they were of opinion that there was a will in writing signed by the testator, or to which his name was subscribed by his direction, and witnessed by two witnesses in his presence, and declared to he his will, then the paper now offered would not be his last will; but that both wills might stand, if there was no clause of revocation in the last will, or if there were no contradictory bequests or devises, and that the burden of proof was on the defendant to show by the last will itself, if to be had, that it revoked the former by containing an express clause of revocation, or that the dispositions of the property by each will were contradictory. But the last will was not produced by either party, nor were the contents of it given in evidence by any witness. The jury should, if they believed the evidence, find

(367) the paper now offered to be the last will of Edward Crowell, unless they should be of opinion, from all the evidence, that the last will had been suppressed by the plaintiffs, or those under whom the plaintiffs claim, or by their advice or procurement; in that case they ought to find a verdict for the defendant, because they might presume a revocation or contradictory devises from the fact of suppression. But if the jury should be of opinion that Rebecca Tillery, of her own accord, destroyed the last will without the consent or knowledge of the plaintiffs, or those under whom they now claim, or if the testator destroyed it, then, in either of these events, they should find for the plaintiffs. If the testator destroyed the last will and retained the first, the first is again set up as his will. If Rebecca Tillery, the depositary, destroyed the last will without any fraudulent coöperation of the plaintiffs or those under whom they claim, then the burden lay on the defendant to show a clause of revocation or contradictory dispositions by the last will; that the defendant had failed to do so, either by the last will itself or any other species of proof. The court further charged the jury that there was nothing in the objection of plaintiff's counsel to the last will, that the testator had not said the signature was his, or because it was not proven to be his handwriting; but if they were satisfied that he offered a paper-writing to the witnesses with his name signed, and said it was his will, that was sufficient. Verdict for defendant; judgment accordingly, and appeal by plaintiffs.

Gaston for appellant.
Seawell contra.

(370) TAYLOR, C. J. There is no proof that the second will was ever in the plaintiff's possession, and therefore a notice to produce it would be totally unnnecessary; but there is evidence that the will was placed by the testator in the hands of Rebecca Tillery, since which period it has been traced no farther. Now, the ground upon which the defendant offers proof of the execution of the will is the charge of suppression against the plaintiff, or those under whom she claims. It appears to me that this fact should be first established by the best evidence the nature of the case admits of, that is, the testimony of Rebecca Tillery and the production of the paper enforced by a *subpœna duces tecum.* I understand it to be an elementary rule that when the ground of admitting the secondary evidence is the loss of the original, it ought to be shown that diligent inquiry has been made; and the last person into whose possession the paper has been traced should be called to give an account of it. Upon this principle it has been decided that to entitle a party to give evidence of the contents

of a will alleged to be destroyed, where there is not sufficient evi- (371)
dence to warrant the conclusion of its absolute destruction, the party must show that he has made diligent search and inquiry after the will in those places where it would most probably be found if in existence. 12 Johns., 192. And where it appeared that an indenture of apprenticeship consisted of two parts, one of which had been destroyed and the other had come to the hands of a person that was living, and had not been subpœnaed, but had been heard to say that he could not find the part and did not know where it was, it was held that this was not a sufficient ground for admitting parol evidence of its contents. 6 Term, 236. In all such cases the invariable rule is for the court to pronounce, in the first instance, whether there is sufficient proof of the loss or destruction of the paper, or whether sufficient inquiry had been made to render parol evidence of the contents admissible. But *here* the whole evidence, that of the suppression of the instrument and the secondary evidence of its execution, was all submitted to the jury in the first instance, for which practice I cannot find a single authority. And the principle of evidence is directly opposed to it; for if the court had pronounced in the first instance whether the evidence of the suppression was sufficient to authorize the secondary evidence, it seems evident to me that it must have been rejected, both for its insufficiency as to the suppression and its defect in not showing that proper inquiries respecting the paper had been made of Rebecca Tillery; and then all the evidence respecting the execution of the will, and the inferences drawn from it that it operated a revocation of the first will, must have been excluded. The danger of such evidence consists in this, that it may unconsciously influence the judgment of the jury, and make impressions upon it which no subsequent advice of the court will be able to efface. The effect of such a procedure in this case has been that, because the will was placed in the hands of Rebecca Tillery,
who was a sister to the wife of the younger Crowell, the jury (372)
have inferred a suppression by him or by her; and because it was suppresssed they have further inferred that it amounted to a revocation of the first will—a string of inferences that might have been broken by the testimony of Rebecca Tillery or by inquiries of her. The paper might have been produced, and might have turned out not to be a will, or, if a will, not amounting to a revocation of the first. The answer to this reasoning is that, however just it might be towards showing that the defendant ought not to be at liberty to prove the contents of the will, it is yet inconclusive to show that he ought not to prove its execution, an isolated fact from which the jury would draw their conclusions. It strikes me, however, that it would be safer, in the view of a just and temperate decision of the cause, to *prove* its contents rather than

to *conjecture* them under the influence of a belief that the will has been suppressed by the plaintiff. The presumptions which the law authorizes in its abhorrence of spoliation are too unlimited and severe to be let loose without clear and satisfactory proof of that spoliation. The existence of the paper, charged to be spoliated, should be proved positively, and not supposed or inferred from circumstances out of which the supposition does not necessarily or naturally arise. 2 P. Wms., 720. I am constrained to think, in this case, that sufficient efforts were not made to ascertain from Rebecca Tillery whether the will was in existence or not; and that it ought not to have been left to the jury to infer a suppression by her, or by the plaintiff, or those under whom she claims, from the single fact that it was delivered to Rebecca Tillery.

HALL J. I think the defendants ought not to have been permitted to prove the execution and existence of another and subsequent will before they made it appear to the court that they had made reasonable efforts to procure it. And I think there would have been (373) nothing unreasonable in this, for the will was proved to have been delivered to Miss Tillery, and a *supœna duces tecum* might have been procured to enforce her attendance with the paper-writing, or will, or account for it. It seems that the witnesses did not read the paper-writing which Edward Crowell procured them to attest as witnessses. They gave in evidence that he told them that it was his last will and testament. If that paper had been produced, the fact would have appeared whether it was a last will and testament or not. So far from endeavoring to procure it by *subpœna duces tecum,* they went to trial without the testimony of Miss Tillery, although she was summoned, and did not attend.

As the defendants had taken no step to procure the will, and evidence was given to prove its execution, I think a new trial ought to be granted. The charge of the court was given as to a fact which the jury was at liberty to believe from the evidence, namely, that the paper-writing was in the possession or under the control of, or suppressed by, the plaintiffs. If this was the fact, whether the defendants could avail themselves of it without giving notice to produce it I will give no opinion. On the one side it is argued that if they were possessed of it, or had it under their control, they were guilty of a fraud not to produce it; they knew, without notice being given them for that purpose, that it was their duty to produce it. On the other side it is argued that a party shall not avail himself of a deed or writing by proving its execution, unless he has used endeavors to procure it by demanding it of the party or giving notice to produce it; that the reason why the production of a deed is ever dispensed with is because the party has no control over it.

As far as this principle is involved in the present question, the inclination of my mind is with the plaintiff. But I give no opinion on that part of the case. For the reason I have first assigned, I think there should be a new trial. (374)

HENDERSON, J., *dissentiente:* The paper which the defendants allege revoked the will in question, not belonging to them or being within their control, excuses them from its nonproduction on the trial, for the law imposes on no one a thing beyond his power. If the paper is alleged to be in the possession of the adversary, notice must be given to him to produce it on the trial before parol evidence shall be received of its contents; but if it is destroyed no such notice is necessary. These preliminary facts to let in the secondary evidence, both as to their truth and sufficiency when shown, belong to the court and not to the jury. See a very clear and able opinion on the latter question delivered by *Judge Spencer* in 16 Johns., 193. But neither of these questions arises in the present case. The defendant offers no secondary evidence, nor does he offer parol evidence of the contents of the paper. But the facts on which he relies are that, after the time of the execution of the will offered for probate, the testator, in the presence of two witnesses, acknowledged his signature to a writing, which he declared to be his will, and requested them to attest it as witnesses, which they did in his presence; that on the next day the paper was seen in the possession of a Miss Tillery, sister to Mrs. Eure, now the wife of the plaintiff Eure, and being then the wife of Crowell, the only son of the testator, and the principal legatee and devisee in the will offered for probate; and that the said Miss Tillery lived with and in the house of the son of the said Crowell; that on the Wednesday thereafter the testator committed suicide, and that the son on the same day, after hearing of the violence committed by the father on himself, also committed a similar act; that Miss Tillery had been summoned by both parties, but was not present. From these facts the defendant insisted that Crowell had destroyed the latter writing, and that in *odium spoliatoris* the jury should presume either that the writing contained a clause of revocation or was inconsistent with the will offered. There was no parol evidence (375) of the contents of the will by copy, or other evidence of a like kind; nor was any argument drawn of its being a revocation, but from the fact of its destruction by Crowell, or some one by his connivance or direction. With the fact of destruction the court had nothing to do, nor with inferences to be drawn from it. They both belonged to the jury. They were not preliminary questions to the introduction of secondary evidence; for this reason notice to produce the original was unnecessary. And here there was no inferior evidence offered; it was all primary; for every fact deposed to went to the making and destruction of the paper. Whether they were sufficient to establish them belonged to the jury. It is sufficient for us to see that the evidence was competent and relevant. And I think it was. As to the charge of the court, I think it perfectly correct if we strike out the word *ought* and insert the word *may,* for such was very evidently the judge's meaning; for he says you ought to find for defendant, for you may presume, if you think proper, that the latter will contained a clause of revocation, or was inconsistent with the first will *in odium spoliatoris;* that is, if you should draw such a conclusion of facts, viz., that the last will contained a clause of revocation, or was inconsistent with the first will, which inference you may draw *in odium spoliatoris,* then you should find for the defendants, viz., that the last will revoked the first. Which is a correct legal inference from the facts; that is, that if the last will contained a clause of revocation, or was inconsistent with the first will (on which fact the jury were to pass), then the conclusion of law was that the will was revoked. I think the jury were properly instructed by the judge upon the point of signing by some one for the testator, and in his presence and by his direction. This precaution is necessary only where there is no after recognition of the signature. When (376) the attestation is made by the witnesses of its being the testator's will in consequence of his directing some one to sign for him, and there is no after recognition of it and publication of the will, to prevent another paper being imposed upon the testator it must be signed by such persons in his presence. But where he, after the signing, acknowledges the signature and publishes it as his will, and then witnesses in his presence by his directions attest it, it is immaterial where it was signed. He adopts the signature; and if the testator was of sound mind there could be no imposition by establishing another paper for the genuine one.

I think, therefore, that the rule for a new trial should be discharged.

PER CURIAM. New trial.

Cited: Byrd v. Collins, 159 N. C., 643.

STATE v. POWERS.

When it appears from the certificate of the judge that a case was intended to be made by him, but none comes up with the record, this Court grants a new trial.

TAYLOR, C. J. The defendant has appealed from the judgment rendered against him, but no case is made up to enable this Court to judge whether the law has been duly administered; and we must, therefore, have inspected the record to decide on the legality of the judgment. But it appears from the certificate of the judge that a case presenting the points was intended to have been made up, but was prevented from his having lost the notes of the trial. Under these circumstances there is no other mode by which the justice of the case can be attained but by awarding a

PER CURIAM. New trial.

Cited: Isler v. Haddock, 72 N. C., 120; *Sanders v. Norris,* 82 N. C., 245; *S. v. Randall,* 88 N. C., 613; *Comrs. v. Steamship Co.,* 98 N. C., 167; *McGowan v. Harris,* 120 N. C., 140; *S. v. Robinson,* 143 N. C., 624.

STATE v. PERKINS.

Where declarations were offered in evidence as having been made in the presence of a party and not contradicted by him, and it was also in evidence that the party to be affected by them was partially intoxicated, it was properly left to the jury to ascertain whether the party was too much intoxicated to hear and understand the statement when made.

THIS was an indictment for an assault upon one Sally Fowler, (377) tried before *Badger, J.,* at SURRY.

On the trial it appeared that the defendant Perkins, with one Davis and one Warden, who were charged in the same indictment, had gone to the house of Sally Fowler, arrested and taken her to the house of one Harris, a justice of the peace; when they arrived at the house of Harris, Sally Fowler made some statements respecting the conduct of the defendant Perkins towards her at the time of the arrest. A question was made whether these declarations of hers were made in the hearing of Perkins, and were admissible against him. The witness called on to state these declarations testified that Perkins and Warden came in with Sally Fowler, and were in the same room with her; that

Perkins was quite drunk, but not so much intoxicated as to be unable to hear or to understand; that Sally Fowler, in a voice loud enough to to be heard by every person in the room, related the violence used towards her by Perkins, after having called on the other defendant, Warden, to attend to her statement and contradict her if she told an untruth; and, after she had concluded, she asked Warden if her statement was correct, and he answered that it was.

The admission of this evidence was opposed by the defendant; but it was received by the court as a declaration made by Sally Fowler in the presence of Perkins.

The jury returned a verdict of guilty; new trial refused; (378) judgment and appeal.

Attorney-General for the State.
J. Martin for defendant.

TAYLOR, C. J. The Court is opinion that it was properly left to the jury to consider whether, from the circumstances of the case as disclosed in the evidence, the relation of Sally Fowler as to the violence done at her own house was made in the presence of the defendant Perkins, or not; that as there was evidence of his being corporally present, placing that circumstance as a fact beyond dispute, and some evidence of his being mentally present, inasmuch as that, although inebriated, he was not disqualified to hear or understand, it was fit for the jury to decide whether the rational man was so far present as to assent by silence to the narration by Sally Fowler. In the admission of the said evidence there was no error, and the judgment must be

PER CURIAM. Affirmed.

Cited: S. v. Bowman, 80 N. C., 437; *Chemical Co. v. Kirven,* 130 N. C., 163; *S. v. Potter,* 134 N. C., 733.

STATE v. SMITH.

Selling unwholesome provisions not fit to be eaten by man is an offense in any one, indictable at the common law.

THIS defendant was indicted for selling unwholesome provisions, in the following words:

"The grand jurors for hte State, upon their oath, present that Samuel Smith, junior, late of the county of Rockingham, farmer, on the 8th day of November, A. D. 1823, at Leaksville, in the county aforesaid, did then and there unlawfully, falsely, maliciously, mischieviously and deceitfully sell and dispose of to one David Campbell and others certain unwholesome and poisonous beef, and did then and there receive pay for the same, to the great injury of the said David Campbell and his family, to the great nuisance of the good citizens of the State, and against the peace and dignity of the State."

The defendant was convicted below and fined, and moved first for a new trial and then in arrest; both motions having (379) been overruled, defendant appealed.

Attorney-General for the State.

TAYLOR, C. J. The first exception, taken both as a ground for a new trial and in arrest of judgment, that there is no charge of the defendant being a trader in beef, cannot be sustained; for the fact charged in the indictment, and with the circumstances accompanying it, is indictable by whomsoever committed. It is not necessary to state in such indictment that the defendant acted in violation of any duty imposed on him by his peculiar condition; for it is a misdemeanor at common law knowingly to give any person injurious food to eat, whether the defendant be excited by malice or a desire of gain. The charge in *Treeve's case* was for willfully, deceitfully, and maliciously supplying prisoners of war with unwholesome food, not fit to be eaten by man. It was laid as an offense at common law; and an exception was taken in arrest of judgment that it was not indictable, as it did not appear that what was done was in breach of any contract with the public, or of any moral or civil duty. The defendant was, in fact, a contractor with the public for supplying the prisoners with provisions, but that was not stated in the indictment, nor was it held necessary to state it; and the conviction was supported upon the broad ground that the giving of unwholesome victuals, not fit for man to eat, whether from motives of gain, from malice, or deceit, was clearly an indictable offense. 2 East P. C., 821. There are several precedents of indictments for the same offense, variously modified, stated in 2 Chitty C. Law, 556, on which convictions have been had upon undoubted principles of law. It is true that a very ancient statute was passed further to aggravate the punishment for selling unwholesome provisions, but as I have met with no prosecution upon it, the common law may be supposed to have been weakened by the Legislature's (380) making declarations against offenses which were criminal by the common law, when properly understood. Of this several remarkable instances are stated in Barrington on the Statutes, 313. It seems, upon the whole, that the public health, whether affected through the medium of unwholesome food, or poisoning the atmosphere, or introducing infectious diseases, is anxiously guarded by the common law. There ought to be judgment for the State.

HALL, J. I concur in opinion that the act charged in the indictment is an indictable offense. In 4 Bl., 162, it is said that it is an offense against public health to sell unwholesome provisions. From this it might be inferred that, unless the public were concerned in the act, it was not a public offense, as in *King v. Baldock,* for supplying prisoners with unwholesome food, he being a public contractor for that purpose. 2 Chitty C. L., 556, and the case of the *King v. Treeve,* who was indicted for the same offense. 2 East Cr. Law, 821. But it is laid down by both these writers that the person charged need not be a public contractor; that it is a misdemeanor at common law to give to any person unwholesome food not fit for man to eat, *lucri causa,* or from malice or deceit, apart from other considerations which entered deeply into the demerits of Baldock and Treeve. See, also, 6 East, 133 141; 2 East Cr. Law, 823; 2 L. Ray., 1179; 3 L. Ray., 487. The offense is one that common prudence cannot guard against, and, what is most important, the consequences cannot be calculated. I think judgment should be given for the State.

HENDERSON, J., concurred.

PER CURIAM. No error.

Cited: *S. v. Norton,* 24 N. C., 41.

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(381)

STATE v. MARTIN.—From Northampton.

After verdict of acquittal no appeal lies for the State since the act of 1815, ch. 895.

THE defendant was indicted below for an assault and battery, and, being acquitted, was discharged; whereupon the State appealed. On the reading of the record in this Court, Mr. Attorney-General gave up the cause on the authority of *S. v. Taylor,* 8 N. C., 462.

PER CURIAM. Affirmed.

Cited: *S. v. Powell,* 86 N. C., 643; *S. v. Ostwalt,* 118 N. C., 1214; *S. v. Searcy,* 126 N. C., 1087.

STATE v. LANGFORD.—From Granville.

An indictment charging that the defendants, with force and arms, at the house of one S. R., situate, etc., did then and there wickedly, maliciously, and mischievously, and to the terror and dismay of the said S. R., fire several guns, is good. No technical words are necessary, but it should appear that such force and violence were used as amount to a breach of the peace. All that the law requires in indictments of this kind is that the facts shall be so charged as to show a breach of the peace and not merely a civil trespass.

INDICTMENT in the following words:

"The jurors for the State, upon their oath, present that Robert Thompson and Jonathan Langford, late of the county of Granville aforesaid, farmers, on the 16th day of August, A. D. 1823, with force and arms at the house of one Sarah Roffle, an aged widow woman, situate in the county aforesaid, did then and there wickedly, mischievously, and maliciously, and to the terror and dismay of the said Sarah Roffle, fire several guns, and then and there did shoot and kill a dog belonging to said house, without any legal authority, against the peace and dignity of the State."

THE defendant was found guilty and the judgment arrested below, whereupon the State appealed.

Attorney-General for the State.
Hillman contra.

TAYLOR, C. J. All that the law requires in an indictment (382) of this kind is that the facts shall be so charged as to show that a breach of the peace had been committed, and not merely a civil trespass. Laying the offense to have been committed *vi et armis* does not itself show this, for that is no more force than the law implies; and these words, as applied to forcible entry, were not deemed sufficient to show that a breach of the peace had been committed in the cases from 3 Burr., 1700, 1736, and accordingly the indictments which contained only those words were quashed, while those containing "with a strong hand" were sustained. But the case of *Rex v. Storr* contains internal evidence that if actual force had been shown on the face of the indictment, the words *vi et armis* would have been sufficient; for the counsel for the prosecution, in arguing, say: "One man may commit a breach of the peace, though not a riot; he might be armed with pistols for aught that appears, and this might be possibly proved." To this the Court answers: "Coming with a pistol, though possible, is not to be supposed"; thereby implying that if the fact of coming with a pistol had been laid in the indictment it would have been a circumstance in itself naturally implying such a degree of force as was indictable; and the want of this violence cannot be supplied by the insertion of the common formal words. The doctrine of these cases is confirmed by the case of *Rex v. Wilson and others,* 8 Term, 357, which was an indictment at common law, charging the defendants with having unlawfully and with a strong hand entered the prosecutor's mill and expelled him from the possession. This indictment was demurred to because upon the face of it it charged only a (383) private trespass and not a public breach of the peace indictable. But the demurrer was overruled, the Court holding that the words "with a strong hand" implied that degree of force which constituted the offense; that no particular technical words are necessary in such an indictment, but that it should appear that such force and violence were used as constituted a public breach of the peace. It is true that some stress was laid upon the circumstance that the twelve defendants, with force of arms and with a strong hand, expelled the prosecutor. The principles ascertained in these cases show, beyond a doubt, that this indictment is maintainable, for in it is laid an actual and violent breach of the peace, which does not require the aid of the words "with strong hand," and such a breach of the peace as, if set forth in those indictments in 3 Burr., they would not have been quashed. These men were armed with guns, which they fired at the house of an unprotected female, thus exciting her alarm for the safety of her person and her property. This is the *corpus delicti;* the killing the dog is laid as a matter of aggravation and to show the temper of mind by which the defendants were impelled. It would have been, therefore, quite superfluous to state any ownership in the dog. If any doubt can exist that the offense so charged amounts to a breach of the peace, it will be removed by what is said by Sergeant Hawkins in a passage deriving additional authority by being transcribed by that judicious writer, Dr. Burns, into his book on *Justices of the Peace,* title *"Affray."* Although no bare words in the judgment of law carry in them so much terror as to amount to an affray, yet it seems certain there may be an affray when there is no actual violence; as when a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people, which is said always to have been an offense at common law, and is strictly prohibited by statute." 1 Hawkins, 136. On these reasons (384) and authorities I think the judgment must be reversed.

HALL and HENDERSON, JJ., concurred.

PER CURIAM. Reversed.

STATE v. WOODMAN.—From Edgecombe.

1. **The act of 1794, ch. 406, relative to slaves hiring their own time, has two objects in view: First, to fine the owner; and, second, to abate the nuisance, if it be yet continuing, or, if it be at an end, to pursue the slave and have him hired out.**
2. **The necessity of proceeding by presentment under the act of 1794 is repealed by the act of 1797, ch. 474, sec. 3.**
3. **It is improper to lay an offense to have been committed *after* the finding the indictment; but if a day certain be laid *before*, the other may be rejected as surplusage.**

THIS was an indictment in the following words:

"The jurors for the State, upon their oath, present that a certain negro man slave named Tom, the property of George W. Woodman, late of the county of Edgecombe, merchant, on the 1st day of November in the year aforesaid, at and in the county aforesaid, and on divers other times in the county aforesaid, both before and since the taking of this inquisition, has been permitted by his master, the said George W. Woodman, to go at large, hiring himself to divers persons, he, the said Tom, having hired his own time from his said master the said George W. Woodman, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State."

This indictment, having been returned on the fourth Monday of November to the county court of EDGECOMBE, indorsed "A true bill," a *capias* issued against Tom, his master became bound by recognizance for his appearance, and the plea of *not guilty* was entered. On the trial in the county court the jury returned a verdict of *guilty*, and the defendant appealed from the judgment pronounced. In the Superior Court the jury found a verdict of *guilty*, and the court pronounced judgment that the negro Tom should be hired out by the sheriff of the county, at public vendue, for the space of one year, taking bond and security for the hire, payable to the wardens of the poor and for the use of (385) the poor of said county, and that the defendant pay the costs of the prosecution. The defendant appealed to this Court.

Gaston for defendant.
Attorney-General contra.

TAYLOR, C. J. In construing the act of 1794, on which this (387) indictment is framed, it does not seem that the nuisance must necessarily be continuing when the bill is found. The design of the act is twofold: First, to fine the owner directly for allowing his slave to hire his own time; and, secondly, to abate the nuisance if it be continuing, or, if it be at an end, to pursue the slave in whose person it was committed, in order to have him hired out. Upon the latter branch this prosecution is founded; and although this mode will prove inconvenient to future owners or hirers, by taking the slave out of their possession, yet they take the property *cum onere,* which they must submit to like any other defect in the title. This construction is unavoidable, (388) otherwise the act might be easily evaded by calling home the slave the day before the grand jury is impaneled, and letting him at large again to hire his own time immediately on the adjournment of the court.

As to the necessity of proceeding by presentment, that is repealed by the subsequent act of 1797, ch. 474, sec. 3.

It was certainly improper to lay the offense to have been committed after the finding the indictment; but as a day certain is laid before, this may be rejected as surplusage. The judgment must be

PER CURIAM. Affirmed.

STATE v. MORRIS.

1. A judge is not bound by law to recapitulate all the evidence to the jury in his charge; it is a matter left to his own discretion. If, however, he thinks proper to deliver a charge, he must do so according to the rule laid down in the act of 1796, ch. 52.
2. If a person be present aiding and abetting in the *commencement* of an assault with intent to rescue a prisoner, he does not cease to be guilty because his fears prevent him from going all lengths with his party.

INDICTMENT against the defendant and several others for an assault and battery on one King, a constable, while in the execution of his office, tried before *Badger, J.,* at MECKLENBURG.

The material part of the evidence below was as follows:

On the part of the State is was proved by several witnesses that while King was conveying a prisoner to the jail of Mecklenburg, under a mittimus from a justice of the peace of that county, the defendant, in company with several others, came up to him and said the prisoner should not go to jail if money or security would save him. The officer then told him that the prisoner had once had an opportunity before the justice to give security and had refused. Defendant then asked permis- (389) sion to step aside with the prisoner to talk with him; this the offier refused, unless he himself went with them, which he agreed to do. Defendant, and the officer in charge of his prisoner, then went aside from the jail (at the door of which this conversation had passed), followed by the other persons in company. When they had gone about ten paces the defendant said the prisoner should not go to jail at all. This was repeated by others of the party, and immediately several of them set upon the officer, attempted to rescue the prisoner, and in the prosecution of this attempt the officer was assaulted and beaten.

It did not appear that the defendant himself assaulted or struck the officer. It was also proved that the observation about bailing the prisoner was made by the defendant in a threatening manner.

It was then proved by several witnesses for the defendants that when the officer was set upon and the struggle was going on to rescue the person in custody, the defendant retired from the crowd and said: "Boys, you had better take care what you are about; I will have nothing to do with this."

The case was submitted without argument by the counsel, and the presiding judge, without repeating the evidence to the jury, left the case to them, with instructions to inquire upon the whole evidence whether the defendant and the other persons present made the assault with an intent to rescue the prisoner, and informed the jury that, if this was the fact, all the parties present concurring in the design and encouraging the attempt were guilty as much as if they had personally struck the blows, and the jury was directed, if the defendant was thus concerned, to find him guilty.

The defendant's counsel then requested the judge to repeat the (390) evidence to the jury; this the judge declined to do, but informed the counsel that he was at liberty, then, if he wished it, to argue the case to the jury.

The counsel then prayed the judge to instruct the jury that if they believed the testimony of the defendant's witnesses as to the defendant's declaration, before stated, they should acquit the defendant. The court refused to give such instruction.

The defendant was convicted. Witnesses were then examined by the defendant's counsel, as to the defendant's previous conduct, in mitigation of the punishment. The court intimated an opinion afterwards, when judgment was about to be prayed, that the offense required to be punished by imprisonment, and the defendant's counsel then moved for a new trial; first, because the judge refused to repeat the testimony to the jury, and, second, because the judge refused to give the instructions prayed for by the defendant's counsel.

A new trial having been refused, and judgment pronounced, the defendant appealed.

The case was submitted by the Attorney-General without argument.

TAYLOR, C. J., The exceptions taken to the judgment in this case are that the judge who tried it was applied to by the defendant's counsel to repeat to the jury the evidence before they retired, and, secondly, that the judge refused to instruct the jury that if they believed the testimony of the defendant's witnesses they ought to acquit the defendant. It cannot be traced or ascertained on the first point that any rule of the common law exists that makes it imperative on a judge to repeat the evidence to the jury. He is placed on the bench to the end that he may preside over the order and solemnity of trials, maintain the authority of the laws, and administer them upon all applications which are solely confined to his jurisdiction. If on the trial of a cause the witnesses are numerous, the evidence complicated, and the main question (391) or principal issue obscured by various and conflicting testimony, he may, in his discretion, sum up the whole to the jury, that they may apply it properly and have their attention directed to the essential points in controversy. No judge would ever refuse to impart such assistance, when it is requested by a jury, nor would he withhold it in any case wherein the nature of the evidence or the conduct of the cause led him to believe that his aid would enable them to discharge their constitutional functions with more correctness or facility. But it must of necessity depend on the circumstances of each case whether the judge believes that his aid would be of any efficacy; whether the case be not so plain and intelligible as to render his interference unnecessary, or the evidence so equally balanced as to make it unsafe. All these considerations the law has wisely confided to the sound discretion of the judge; and it affords a singular testimony in favor of our free institutions that the reluctance of judicial interposition should be made a subject of complaint, when in other countries, where the same system of law prevails, the invasion of the rights of juries has been an abundant source of public evil. The common law is not altered in this respect by the act of 1796, ch. 52, which professes only to prescribe the manner in which a judge shall charge the jury when he thinks fit to deliver a charge, not to make it his duty to deliver one if he deem it unnecessary. "It shall not be lawful for any judge, in delivering a charge to the petit jury, to give an opinion whether any fact is fully or sufficiently proved, such matter being the true office and proper province of the jury; but it is hereby declared to be the duty of the judge in such cases to state in a full and correct manner the facts given in evidence, and to declare and explain the law arising therefrom." No implication can arise from this law that he must charge the jury; but if he does charge them, he must (392) do it according to the rule there laid down. On any question of law which may arise during the trial, either party has an undoubted right to demand the opinion of the court, for this is essential to the proper administration of justice. In this case the court gave an opinion on the law by refusing to give the instruction prayed for by the defendant's counsel. It was distinctly decided by the court that the defendant was guilty in point of law, upon the supposition of the jury's believing the witnesses for the State, although they should also believe the defendant's witnesses. And, upon looking into the case, it seems impossible to doubt as to the correctness of this opinion; for the defendant's witnesses testified that when the officer was set upon, and the scuffle going on to rescue the party in custody, the defendant retired from the crowd and said: "Boys, you had better take care what you are about; I will have nothing to do with it." The defendant had previously told the officer, in a threatening and intimidating manner, that the prisoner whom he had in custody should not go to jail if money or security would save him. He afterwards repeated that the prisoner should not go to jail at all, and immediately several of the party set upon the officer and attempted a rescue, in the course of which the officer was assaulted and beaten. If the jury believed that the defendant was an aider and abetter in the commencement, he did not cease to be a cotrespasser because he was unwilling to go all lengths with his party.

The judgment must be

PER CURIAM. Affirmed.

Cited: S. v. Lipsey, 14 N. C., 489, 495; *S. v. Langford,* 44 N. C., 444; *Boykin v. Perry,* 49 N. C., 327; *Holly v. Holly,* 94 N. C., 100; *S. v. Boyle,* 104 N. C., 820.

(393)

STATE v. CANDLER.

1. A witness who has been convicted of forgery in Tennessee is incompetent in the courts of North Carolina.
2. A witness who, some years before, was much in the habit of receiving and paying away notes of a particular bank, and was an attentive observer of such notes, is competent to prove the genuineness or forgery of a note on that bank, although he may never have seen the president and cashier write, and has never received any letters from them.

INDICTMENT for forgery, in the following words:

"The jurors for the State, upon their oath, present that Zachariah Candler and Elias Jones, both of the county of Buncombe, being evil disposed persons, and designing feloniously to cheat and defraud some person to the jurors unknown, on the 1st day of April, in the year of our Lord 1823, with force and arms, in the county of Buncombe aforesaid, feloniously did falsely make, forge, and counterfeit, and cause and procure to be falsely made, forged, and counterfeited, and willingly aid and assist in the false making, forging, and counterfeiting a certain note commonly called a bank note, which said false, forged, and counterfeited bank note is as follows, that is to say: [Here follows a copy of the note, purporting to be a note of the Farmers Bank of Virginia for $10], with intention to defraud some person to the jurors unknown, contrary to the statute in that case made and provided, and against the peace and dignity of the State."

The second count was similar to the first, except that it charged an intention to defraud the president, directors, and company of the Farmers Bank of Virginia.

On the trial, before *Badger, J.,* at BUNCOMBE, it was proved on the part of the State that the note in question was found in defendant's possession, together with paper and other materials suitable for the fabrication of bank notes.

The State then called on a witness Smith to prove the note a forgery. He swore that for ten years he had been acting as a merchant in the town of Asheville; that during that period, and particularly during the first six years of it, he had received and passed away a large number of bills of the Farmers Bank of Virginia, as well as on the other (394) banks of that State and this; that during that time more than $5,000 in bills on the Virginia banks had passed through his hands, but the particular proportion of the Farmers Bank he could not ascertain; it had, however, been considerable, and the greater part of the notes had been received and passed by him as genuine more than four years ago, and not one had ever been returned as counterfeit; that he had been an attentive observer of bank notes in general, and especially those of the Farmers Bank; that he had never, to his knowledge, been imposed on by a counterfeit; that he considered himself a competent judge of the notes of the bank in question, and if the notes which he had received and passed were genuine this note was counterfeit. This evidence was objected to, but the court received it.

Garth, an accomplice in the felony, was then called to the prove the fact of forgery. He was objected to on the ground that he had been convicted of forgery in the State of Tennessee; and in support of the objection a duly authenticated transcript of a record from Tennessee was produced, showing that one Barkley had been indicted, tried, convicted, and received sentence for forgery. The identity of Garth, the witness, and Barkley, the convict, was fully proved; and it was also shown that Garth had actually been whipped, placed in the pillory, and suffered the other punishement directed in the judgment. The court held that the objection went to the credit of Garth, and not to his competency, and he was sworn.

The defendant was found guilty. The admission of the testimony of Smith and Garth formed the ground of a motion for a new trial, which, having been refused, defendant appealed.

Gaston for defendant.
Attorney-General contra.

TAYLOR, C. J. That rule of common law which renders a (397) person incompetent to give evidence in a court of justice who has been convicted of an infamous offense is not the consequence of an artificial system, or a state of society peculiar to certain communities, but is founded in the constitution and nature of human associations generally, and is dictated by the necessity, universally felt, of maintaining the purity of the institutions through which justice is administered. A man who stands convicted of falsehood by a tribunal having competent jurisdiction of the offense is deprived of the common presumption, raised by law in favor of witnesses, that they will tell the truth; he can no longer be confided in when he deposes to facts and circumstances affecting the rights of others, and therefore the law, that the stream of justice may not be polluted, will not suffer such a witness to be heard. The objection attaches to his state or condition, which, whenever it is necessary to be considered in relation to its influence on the security of others, may be taken with propriety, if no technical rules interpose to prevent it; for the subject itself is of a moral nature, independent of the conventions of men; and as truth and justice are not confined by geographical limits, but are coextensive with the concerns and relations of civilized communities, the crime which, in reason, renders a witness incompetent in one country must do so in all. The principle of the exclusion is universal, and ought to be binding everywhere, though it may have peculiar modifications stamped upon it, according to the usages and manners of different nations. In some shape or other witnesses have been deemed incompetent on a conviction of certain crimes in every civilized state, a coincidence of sentiment and practice which can only be ascribed to a correct influence from a principle of natural justice. In the civil law a great degree of strictness prevailed with respect to the competency of witnesses. Its rules excluded many persons for objections which, in our law, are confined to the credibility. They rejected not only all persons who were rendered infamous by any condemnation, but (398) also those in whom there was a suspicion of the state of good fame, by order for his apprehension. They would not even allow fathers, mothers, or children to give evidence against each other. 1 Pothier, 519.

They even rejected persons of particular occupations and whole tribes of people. Calvinus; 1 Atkyns, 37. But the strictness of the rule of that law was relaxed according to the necessity of the case; and its extreme rigor rendering it, in some cases, insufficient to the detection and punishment of crimes, the courts were compelled to prefer practical expedience to the vain attempt at theoretic perfection. Thus we find that a modern writer on the imperial criminal law, as practiced in Saxony, states that even incompetent witnesses are sometimes admitted, if the truth cannot be got at, and this particularly in facts and crimes which are of difficult proof. Gail Lib., 2. The superiority of our law consists in its laying down the rule, with its proper exceptions and limitations, and leaving nothing to the discretion of the courts. A concurrence between the two systems on general principles is thus shown; but it results from it that it would be embarrassing to decide on the competency of a witness who had been declared disqualified in a State where the civil law prevails. Wherever the common law forms the basis of the jurisprudence of a State, and a witness is disqualified either by that or by statute, of which proper evidence is exhibited to a court here, I can see no reason wherefore the witness shall not be excluded. It is admitted fully that wherever the elementary writers on evidence discourse on the necessity of producing the record of conviction in order to exclude a witness, they mean a record of some court within the kingdom, of the existence of which the court is to decide on the plea of *nul tiel record;* such a record, in other words, as the court might order to be brought before them by a *certiorari.* Conviction in another country was not contemplated, because evidence of such conviction is

not a record; it is only *prima facie* evidence of the fact, and must be judged of by the jury, in which case the competency of the witness is not questioned. Since the union between England and Ireland, an Irish judgment is a record; yet not being returnable into the King's Bench, and only provable by an examined copy, on oath, the truth of the evidence must be tried by the jury and not by the court. 5 East, 473. Considering the subject in reference to technical rules, I should believe that an English court of justice would either not notice a conviction in another country or leave it to the jury as an objection to the credibility of the witness. But the Constitution of the United States and the act of Congress made in pursuance thereof have changed the law in this respect, and furnished satisfactory ground for the exclusion of this witness. The act of Congress of 1790, ch. 11, declares "that the records and judicial proceedings, authenticated in the manner prescribed, shall have such faith and credit given them in every court within the United States as they have by law or usage in the courts of the States from whence the said records are or shall be taken." The faith and credit which would be given to this record in the State of Tennessee must also be given to it in this State; and, being exhibited here, it shows that Garth has been convicted of a crime which, acccording to the laws of both States, render him an incompetent witness. When the act of Congress made it a record, and prescribed the manner in which it should be authenticated, it is equivalent to a record proved by inspection of a court of its own record, or an exemplification in any other court of the State where the judgment was pronounced. If this question were doubtful to me, I should be led to the same conclusion by reflecting upon the many evil, inconconvenient and unjust consequences of an opposite one, always bearing in mind the rule laid down by Vaughan, 74: "When the law is *known and clear,* the judge must determine as the law is, without regard to the inequitableness or inconvenience. These defects, if they happen, can only be remedied by parliament." That a witness (400) who, if he were offered in Tennessee to charge another with a dollar, should be rejected there, and be admitted here to affect life and character; that he should be received here in the State courts and rejected in the Federal courts; and that in a country where so many motives impel the citizens to explore new regions they may be followed and judicially destroyed by persons upon whom the law of their native State has set a note of infamy, are effects of so mischievous a character as to be averted, if legally possible.

On the other question relative to the admissibility of Smith, my opinion coincides with that of the judge who tried the cause. It appears to me that the witness's knowledge of the handwriting, acquired in the way he describes, is as much to be relied upon as if derived from a correspondence, and approaches nearly to that obtained from having seen the party write. It is scarcely possible, in the nature of things, that if any of the notes received by the witness throughout so long a period had been counterfeit they should not have been returned. Their not returning shows their genuineness.

HENDERSON, J. After much agitation and diversity of opinion in our courts of justice, it is now, I believe, the settled law, as understood both in the Supreme Court of the United States and of this State, that by virtue of the first section of the fourth article of the Constitution of the United States the judicial proceedings of one State are conclusive evidence of the facts which they affirm, when offered as evidence in other States, and when authenticated in the manner prescribed by the Congress of the United States the court, and not the jury, is the trier of the fact when the issue is directly upon them. When the issue is not directly upon them, they, like our own judicial proceedings, go to the jury. The issue in this case being directly upon the affirmation of

(401) the record (the moral depravity of the witness), goes to the court and the record directly establishing that fact, which by our law renders him incompetent, he should have been rejected. In doing this we are not enforcing the penal laws of other States, nor the penal laws of our own State, for this is inflicting no punishment on the witness; but are simply carrying our own laws into execution, which declare that persons who have been guilty of the *crimen falsi* are entirely unworthy of belief; and we take as evidence of such fact the judicial proceedings of our sister State, which the Constitution of the United States declares shall have full faith and credit in each State. If the exclusion of men convicted of such acts from giving evidence were a punishment, then he ought to have been received, for truly he has not offended against the laws of this State, and we have, therefore, no right to punish him. But it is a duty which we owe to those who are to be affected by the judgments of our courts that the courts should be kept clear of such depravity, and that no proceedings should be founded upon it. It is asked, What if the Governor, or proper authority of Tennessee, should have pardoned him? That question has not arisen in this case; but as we trust to the judicial proceedings of Tennessee to fix the fact of his guilt, perhaps we should also trust to the proper authority in doing it away for some proper cause; for that there was a proper cause is a legal presumption which cannot be controverted either here or there. It is further said that no such precedent can be found in the English decisions. It is admitted, for they do not give full faith and credit to the proceedings of any courts but those of their own country; both the laws and proceedings of other countries are tried as facts by the jury. The question, therefore, cannot be brought before the court; and even if the witness should admit his guilt in England, or his conviction in a foreign country, the admission is not conclusive evidence of the facts. It does not import verity; it may be false, and the court cannot try it. The testimony must,
(402) therefore, go to the jury, who will appreciate it as they think proper. The fallacy of the opposite reasoning, I think, is that it is supposed that it is the conviction which qualifies, whereas it is the crime. The conviction establishes the fact of criminality in such a manner that it cannot be controverted; and if it cannot be controverted the witness is not to be heard. And a conviction being the only method by which the fact of criminality can be so fixed that it cannot be denied, and facts which cannot be controverted being at once submitted to the court in order that the legal inferences may be drawn (for why send a fact which the law will not permit to be controverted to triers of facts, who will be bound to return it in the same state to the court, entirely unchanged?), this, I say, has given rise to the opinion that it is the con-

viction which disqualifies a witness, whereas it only incontrovertibly establishes the fact of criminality, and it is the criminality which excludes him. For these reasons I think there should be a new trial.

HALL, J., differed from his brethren on one point in the case, and delivered his opinion as follows:

I confess I entertain doubts in this case, but I am rather inclined to the opinion that the court was right in not rejecting the witness (Garth) as incompetent. I think that in England convictions *only* within the kingdom exclude witnesses. It is so with respect to convictions or attainders for treason, and there seem to be no discrimination in that respect. Here, I think, too, that conviction within the State only can exclude testimony, although since the adoption of the Federal Constitution we give faith and credit to the records of our sister States. Do we allow to them the effect contended for? If convictions within the State only disqualified before that time, will that clause in the Constitution which gives full faith to the record of each State alter our municipal law as to the rule of receiving or rejecting witnesses? If it was (403) a rule before not to reject them, when not convicted in the State, shall we now reject them? A conviction may not disqualify a witness in the State where it takes place, and the laws of which have been violated, but may disqualify him in another, the laws of which have not been violated. A pardon may be obtained in the State where the conviction takes place, but it cannot be granted in another, because the laws have not there been violated.

I regret that I have not the cases of *Commonwealth v. Greene,* 17 Mass., 515, and *Clark v. Hall,* 2 Har. & McHen., 378, of which notice is taken in Norris's Peake, 200. The Court in the first case was for receiving the testimony, in the other for rejecting it. The inclination of my mind is that the judge in this case was right in receiving the testimony.

With respect to the competency of the witness Smith, no objection is raised either on the ground of interest or infamy, but on the ground of ignorance as to facts of which he was introduced to give evidence. The charge against the prisoner is of such a nature as that it cannot be proved by positive testimony, and it is argued that it can be established only by persons who are acquainted with the handwriting of the president and cashier by having seen them write, or by persons who have acquired acquaintance with their handwriting by having carried on a correspondence with them by receiving letters from them. If these were the only ways in which that knowledge could be acquired, the argument would be conclusive; but this does not appear to me to be the fact. A person who has been employed in a banking house where much of the paper of any other bank had been received has an equal opportunity, if not better, of acquiring a knowledge of the signatures of the president and cashier of that bank. And the same thing may be said of a person through whose hands a great deal of the paper of any bank has (404) passsed, and who has been a strict observer of such paper, for there is no magic in the circumstance that such knowledge was acquired in a bank. If it is equally well acquired elsewhere it is equally good. It is the province of the court and jury to weigh all the evidence, and ascertain whether it comes from persons who possess that knowledge. I think a person who receives and pays away hundreds of bank notes has as good an opportunity of judging of the signatures upon them as if he had received a few letters from the persons whose signatures they are. It is said these notes may be counterfeit ones; there is a bare possibility of that; there is much or moral certainty that the great bulk of them are genuine. The argument *ab inconvenienti* should not be overlooked, for in very many cases, if such testimony is rejected, the guilty will escape; for probably no person can be found who can establish the charge in the way insisted on. However, if the law is so, it should be my duty to submit. But *United States v. Holtsclaw,* 3 N. C., 379, is an authority in favor of my argument; and one, too, on which (when it is remembered by whom it was decided) I may repose with much safety. I think the judge did right in not rejecting this witness.

PER CURIAM. New trial.

Cited: S. v. Cheek, 35 N. C., 120; *In re Ebbs,* 150 N. C., 47, 61.

STATE v. WELSH.

The title of a statute is no part thereof; when, therefore, the State on an indictment for forgery produced a certified copy of an act of South Carolina reciting the title of another act of that State, it was held that this evidence was not sufficient to establish the present existence of the act referred to; a certified copy of the act itself would be better.

THE defendant was indicted for attempting to pass to one William R. Smith a forged note of $100 on the bank of South Carolina with intent to defraud Smith, and knowing the same to be forged, and tried (405) before *Badger, J.,* at RUTHERFORD.

The indictment charged that the defendant, "being an evil disposed person and designing and intending feloniously to defraud one

William R. Smith, on the 1st day of October, in the year of our Lord 1822, in the county of Buncombe aforesaid, did attempt to pass feloniously and fraudulently to the said William R. Smith, as good and genuine, a false, forged, and counterfeited bank note purporting to be a good and genuine bank note of $100 on the Bank of South Carolina, which false, forged, and counterfeited bank note is as follows, to wit: [Here follows the note] with intent, etc., he, the said William Welsh, then and there well knowing, etc."

On the trial before *Badger, J.*, the attempt to pass the note, and defendant's knowledge that it was not genuine, were satisfactorily proven. To show that there was such a bank as that mentioned in the indictment, the State offered in evidence a duly certified copy of an act of the Legislature of South Carolina, passed in 1802, entitled "An act to incorporate the State Bank," and imposing certain restrictions on the directors, officers, and servants of banks in this State. The only part of this act material to this purpose was the first section, in these words: "*Be it therefore enacted,* That so much of the act passed on the 19th day of December, in the year of our Lord 1801, entitled 'An act to incorporate the South Carolina and State banks,' as relates to the said State banks, be and the same is hereby repealed."

Two objections were taken to this evidence: First, that the law produced was not the act of incorporation, but an act which referred to it; and, second, that the act referred to incorporates the South Carolina Bank, and not the Bank of South Carolina mentioned in the indictment.

The judge received the evidence and left it to the jury to say upon that evidence whether there was such a bank as "the South Carolina Bank" mentioned in the act, and whether that is the same bank (406) with the Bank of South Carolina mentioned in the indictment.

The jury found the defendant guilty; a new trial having been refused, the defendant appealed.

Gaston for appellant.
Attorney-General contra.

TAYLOR, C. J. This is in indictment for attempting to pass as good and genuine a forged note of $100 on the Bank of South Carolina. In order to prove the existence of such a bank a certified copy of an act of the Legislature of South Carolina is introduced, which was (407) passed in the year 1802, and entitled "An act to incorporate the State Bank, and imposing certain restrictions on the directors, officers, and servants of banks in this State." The first section of this act, the only part of it shown in evidence, repeals so much of the act passed 19 December, 1801, entitled "An act to incorporate the South Carolina and

State Banks," as relates to said State Bank. The objection taken to this evidence is that it is not a certified copy of the act of incorporation, but of another act referring to it. It must be acknowledged that a certified copy of one act is, as far as it goes, equal to a certified copy of another act, though it may not afford equal assurance of the fact. It is evidence of the same kind; and its sufficiency to establish the fact is to be judged of by the jury; in the same manner as the execution of a deed may be proved by one subscribing witness alone, although there are others to the deed who are not called. Accordingly, if the copy now offered recited the act of 1801, I should deem it unexceptionable, as coming from the same source with a copy of the first act, made on purpose to be certified. But here the title of the act of 1801 is alone recited, and it may be presumed from hence that evidence of a higher degree, viz., the act itself, or a copy, is kept back; and then the legal presumption follows that if it were produced it would disprove the fact sought to be established. The fact in controversy here was whether, when the defendant attempted to pass the note, viz., 1 October, 1822, there was such a bank in existence as the Bank of South Carolina. The best evidence of that fact is a copy of the law enacting the bank, for that alone can show the duration of its charter; but the evidence offered is the recital of the title of such act. The title of an act is not part of the act. Barrington, 444; I Ld. Ray., 72, and appears to me to be inferior evidence to the act itself.
(408) On this ground I think there ought to be a new trial.

HALL, J., was of the same opinion.

HENDERSON, J. To bring the offense within the act of 1819, under which the defendant is indicted, the State must prove not only that there once was, but that there was on the day the note in question bears date, such a bank as the note purports to be issued by, and that the note, if genuine, would be obligatory on said bank. These are questions of fact; but the evidence by which they are to be proven must first be judged of by the court, to see that it is competent and relevant. A fact may be proven two ways: first, by proof direct; secondly, not by proving the fact in controversy, but by proving some other fact from which such fact may be inferred. To give the utmost credit to the evidence in question, as to its direct effect, it only establishes, and that by way of recital and implication, that the Legislature of South Carolina, in the year 1800, passed an act incorporating the bank in question. But whether that act, by the terms of its limitation, continued up to the time this note bears date, or expired before; whether this is the form of these notes; whether they act in this, or any other particular, by a president, directors, and cashier, or by either of these officers, or whether they have such, in no wise appears. They may act entirely in a different manner, and by different officers and organs; that they do act in making notes by a president and cashier is founded only in conjecture; because most banks have such officers and act by them, and use this form in making their notes. But conjecture is not the basis on which judicial proceedings rest. I say that these facts appear neither by direct proof nor by an inference warranted by law; and if so, the court should have put its hands upon it as irrelevant. I think it should also have been rejected because the very evidence itself shows upon its face that the party offering it has better evidence in his power or possession; for the production of a law (409) of an adjoining State, properly certified, is certainly within the power of the State; and the act produced by its recitals and references shows that there is such an act; in truth the contents of these very recitals and references, the State contends, prove the existence of the act in question. The act introduced is, therefore, secondary evidence as to such inferences, for it shows that, if the facts exist, the party has it in his power to produce the primary evidence showing their existence. This, therefore, is not a verdict contrary to the evidence, but a verdict without evidence. It is a mistake to say that judges may draw such inferences of fact as they think proper. They are bound by the law, and cannot make inferences which the law does not warrant any more than they can find against a legal presumption. They can no more infer that A. knows a fact because B., a stranger, knows it, than they can infer that when A., with a knowledge of what he was about, puts a pistol charged with a proper portion of gunpowder and an ounce ball to the breast of B., that A. did not intend to kill B.; for the law presumes the intent by using a weapon proper to effect it. But in the case first put, if A. is the wife of B., and the thing is of a family and domestic nature, and in the case last put, if the weapon is not of a deadly kind, and the question of intent is therefore less doubtful, so that there is not a legal presumption one way or the other, the question of inferring knowledge in the one case and of intent in the other is left to the jury as within their legitimate powers, which shows that a jury has not the arbitrary power of drawing inferences which the facts will not in law warrant. Whatever, therefore, may be the facts, I am satisfied that the evidence did not in law warrant the jury in saying that there was, on the day the forged note bears date, such a bank as it purports to be issued by, and that the note, if genuine, was obligatory on such bank; and, therefore, the evidence should not have been submitted to them.

PER CURIAM. New trial.

(410)

STATE v. LEWIS.—From Warren.

1. When a record states that a court was held before the Hon. J. P. (who is one of the judges of the Superior Courts), without adding that he is one of the judges, it is sufficient.
2. If, upon the second removal of a cause under the acts of 1821 and 1822, the clerk should transmit the *same papers* which had been sent to his office upon the first removal, and a prisoner should be tried and convicted thereon, it furnishes no ground to arrest the judgment.

INDICTMENT for murder, originally found in WAKE Superior Court, removed on affidavit of the defendant from Wake to Franklin, and again removed by defendant to Warren, under the acts of 1821 and and 1822. The record which was sent from Wake to Franklin commenced as follows:

"Be it remembered, that at a Superior Court of Law begun and held for the county of Wake at the courthouse in Raleigh on the first Monday after the fourth Monday in March, A. D. 1824:

"Present, the Hon. John Paxton.

"A bill of indictment was found, etc."

A regular certificate of the clerk, under the seal of the court, accompanied this record to Franklin. When the cause was removed from Franklin to Warren, the clerk of Franklin transmitted to Warren papers certified under the seal of his court, as follows: "That the foregoing copy contains a full and correct transcript of records filed and had in the case therein stated." The prisoner was tried and convicted in Warren, and moved in arrest of judgment on two grounds: first, that the record and proceedings did not show that the indictment was taken before any court having cognizance thereof; and, second, that the Superior Court of Warren had no jurisdiction, there (411) being no transcript sent of the records of Franklin Superior Court. The motion in arrest was overruled, and sentence of death pronounced, from which there was an appeal to this Court; and now, it being understood that the prisoner was unable to employ counsel,

Seawell and Ruffin volunteered to argue the points for him.
Attorney-General for the State.

TAYLOR, C. J. The result of a careful examination of this record is a belief that neither of the objections taken by the counsel of the prisoner can be sustained in point of law. In the first place, the (413) record avers that a Superior Court of Law was begun and held for the county of Wake, at the courthouse in Raleigh, on the day which we know to be that appointed by law; and it further stated that a bill of indictment was returned into open court by the grand jury, with the indorsement "A true bill." Now, we know that by the public general law of the land a Superior Court cannot be held without the presence of one of the judges of those courts, and still less can a jury be constituted and a bill of indictment found by them. The record further states that at the same term the prisoners were brought to the bar, arraigned, and pleaded not guilty; that affidavits of two of them were made for the purpose of moving the case as to them to another county, and such removal was ordered by the court, and that the sheriff of Wake was ordered to deliver the bodies of these two to the sheriff of Franklin; all of which are acts and proceedings the existence of which cannot even be supposed without the presence of a judge of competent authority and jurisdiction. In addition to this, there is inserted in that part of the record, where the presence of the judge (414) is usually noted, the name of a gentlemen whom we know to be a judge of the Superior Courts; and when it is thus certified by the clerk that he was present at a Superior Court where all these attributes and functions of a judge were manifest and exercised, we cannot suppose that any private individual of the same name was accidentally present, whose presence the clerk should deem it necessary to record, and distinguish from that of the numerous persons usually attending. As to the power of the sheriff to open and adjourn the court from day to day until a judge shall attend, or until the third day, that is not a court in the usual meaning of the word, for its only effect is to prevent a discontinuance of the process, and give day to it as if the court had been duly held. 1806, ch. 194, sec. 2. It possesses no authority or jurisdiction whatever; it has no judge, and without the aid of the act cited the clerk could not even enter the formal continuances on the docket. On this objection, therefore, we feel convinced, beyond a personal or judicial doubt, that Wake Superior Court was held at the term by a gentleman who was then and is now one of the judges of the Superior Courts, and, consequently, that the indictment was taken before a court having cognizance.

The other objection is the defect of jurisdiction in Warren Superior Court for want of a transcript of the records of Franklin Superior Court, the clerk of the latter certifying only that the transcript transmitted to Warren is the same transcript which was transmitted from Wake to Franklin. This objection is founded on the act of 1806, ch. 693, sec. 12, which provides that when a cause is removed the judge is authorized to order a copy of the record of the said cause to be removed to some adjacent court for trial; and on the supplementary act passed the same year, which directs the clerk to transmit a transcript of the record to the county to which the cause is removed. From both these clauses there can be no doubt the Legislature designed that the original record should remain in the court where the (415) cause originated; and on this head no alteration has been made by any of the subsequent acts on the subject. It must be determined by the certificate of the clerk of Franklin Superior Court whether he complied with this requisite of the act or not. The proceedings of Wake Superior Court are drawn out at full length and certified by the clerk of that court to be a correct transcript of the records of the case. This transcript was sent to Franklin Superior Court, received there, and entered upon the docket. When the case was removed to Warren Superior Court, the clerk of Franklin certified "that the foregoing copy contains a full and correct transcript of records filed and had in the case therein stated." "The foregoing copy" imports that there was an original from which it was made. As to part of the copy, the original must have consisted of the records sent from Wake, which, though a copy in itself, forms, in relation to the clerk of Franklin Superior Court, when he makes a copy from it to be sent to Warren, an original. "The foregoing copy" contains what? A full and correct transcript. Now "copy" and "transcript," when applied to a writing, signify precisely the same thing; and, therefore, any presumption or implication that the clerk of Franklin by the terms "foregoing copy" meant the copy as sent to them by the clerk of Wake is entirely repelled; for the amount of this certificate is that the foregoing copy contains a copy. This will appear still clearer upon a further analysis of this certificate. Of what is the copy a transcript or a copy? "Of records filed and had in the case therein stated." The "records filed" in the case were those sent from Wake; the "records had" were those transacted in the court of which he was an officer. How was it possible for him to certify that any record was filed in the clerk's office at Wake? So that, *reddendo singula singulis,* he sends a copy of what he has filed, viz., the papers received from Wake and a copy of what took place in (416) his own court. When the law has affixed a definite and well understood meaning to certain terms and phrases, it is an unsafe mode of reasoning to wander into other sciences in pursuit of other definitions which are sometimes equivocal and sometimes metaphorical. In a legal sense, copy signifies a transcript of an original writing, as a copy of a patent, of a chart, deed, etc., and to file a record is to deposit it among the archives of the court for the more safe keeping, or ready turning to the same; derived from *filum,* a thread or string on which writs or other exhibits in office were formerly filed. It seems, therefore, that the last objection is founded upon the misapprehension of the clerk of Franklin's certificate, who does not appear to me to certify that the transcript transmitted to Warren is the same which was transmitted from Wake to Franklin. It is, therefore, the opinion of the court that the judgment be affirmed.

HENDERSON, J. I cannot hope to add anything to the very excellent opinion delivered by the Chief Justice, and should be entirely silent on the subject were it not that, from the manner in which one of the objections very much pressed by the defendant's counsel was disposed of, it might be thought that the objection, if founded on fact, would have prevailed. I mean the objection that upon the removal of the cause from Franklin to Warren the original transcript which was sent from Wake to Franklin, and not a copy of it, was sent upon the removal from Franklin to Warren. This inverts the order of proof and certainty, that which purports to be a copy may not. There may be many blunders or omissions in it after the most diligent search and corrections. Passing by its authenticity, we know that it is inferior to the original, and is only substituted as evidence when the original cannot from any cause be had. And its efficacy depends on its being a correct representation of the original. Its only weight is derived from that circumstance. It cannot be better or carried farther; but as the original cannot be had, necessity compels (417) its acceptance. But in no case can it be considered as superior to the original for any purpose. Public records, for their safety and preservation, are to be kept for those purposes at one place, and are not by law suffered to be carried about to suit the convenience of individuals. Copies of them are therefore received as representing them. The State may, therefore, complain of the clerk of Franklin for violating his duty; and so may this individual, if *he* has suffered any injury by it, and not without. For all the purposes for which this case was sent to Warren the original was equal, at least, to the copy. But it is said that the law is so written, and for the purpose for which it is so written it shall be observed. But I cannot shut my ear to the sound of my own voice and be regardless of the dictates of my own understanding. I was not placed where I am as a mere insensible organ. The laws, or, rather, the letter of the law, must go with a comment, and that comment shall be the will of the Legislature or lawmaking power, as I understand it from their words, not taken word by word and sentence by sentence, but all the words and sentences taken together. I cannot have a doubt—it appears to me impossible that one can be entertained—that that provision in the act requiring that a copy should be sent was for very different purposes than to sustain objections like the present. Could I see that the situation of the defendant could possibly be affected by using the original, I would pause before I would declare that even the original should not supply the place of a copy. But I am certain the direction was given for other purposes than can be applied to support this objection. I must say the objection cannot be sustained.

HALL, J., concurred.

PER CURIAM. No error.

Cited: *S. v. Kimbrough,* 13 N. C., 440; *S. v. Seaborn,* 15 N. C., 308; *S. v. Martin,* 24 N. C., 24; *S. v. King,* 27 N. C., 205; *Short v. Currie,* 53 N. C., 45.

(418)

LATHAM v. BOWEN.

There can be no appeal from an interlocutory decree making no final disposition of the cause.

PER CURIAM. The decree in this case was interlocutory, making no final disposition of the cause, nor disposing of all the matters in controversy between the parties. The appeal was consequently premature, and must be dismissed.

Appeal dismissed.

IN EQUITY

PRICE, BY GUARDIAN, v. JOYNER.—From Martin.

On the trial of an issue directed for the purpose of ascertaining whether an absolute deed was obtained by fraud or misrepresentation, the widow of the grantor named therein is a competent witness to prove that the deed was intended to be a mortgage, because whether the deed was absolute or a mortgage her right of dower was gone.

THIS was a bill filed to set aside a conveyance absolute on its face, on the ground, that it had been fraudulently obtained by misrepresentation, and it was alleged that the intention and agreement on the part of the grantor was to execute a mortgage deed.

The answer, denying the allegations of the bill, insisted that it was the agreement of the parties that an absolute conveyance in fee simple should be made.

In the court below an issue was directed to inquire into the alleged fraud; and on the trial the deposition of Nancy Price, the widow of the grantor in the deed, was offered in evidence by the complainants and objected to by defendant on the ground that she was entitled to dower in the premises. The objection was overruled, and the deposition read. The issue was found in favor of complainants; and the only question before this Court, on the appeal of the defendant, was on the admissibility of this deposition. (419)

Hall, J. There can be no objection to this deposition on the ground that the widow had any interest in the land, because, whether the deed was absolute or considered as a mortgage, her right of dower was gone. If it was considered as a mortgage, it would seem that she was swearing against her interest, because the personal property of her late husband was the fund out of which the money must be raised to pay the debt and redeem the land, which would consequently lessen the fund out of which the law makes provision for her. For these reasons I think a new trial of the issue should not be granted.

The other judges being of this opinion, a new trial was refused.

Per Curiam. Affirmed.

(420)

IN EQUITY

McGOWAN et al. v. COLLINS.

When, on a bill filed to settle partnership accounts, the matters in dispute were referred to arbitrators, who made a report that defendant was in debt to complainants, provided defendant was not liable to pay the amount claimed in an attachment against him for a debt due from the firm, and the court, on complainant's motion, decreed in the alternative, pursuing the language of the report of the referees; it was held that the decree was as *final* as the court intended to make it, the parties being referred to the decision of another court for its final consummation, and that a bill of review would lie to reverse the decree.

The bill, which was filed in April, 1820, set forth that McGowan and Owen Collins, copartners, entered into partnership with John Collins of Halifax, the defendant, in 1818, under the firm name of John Collins & Co.; that it carried on a profitable business for two years, and that during the copartnership complainants furnished goods to a large amount; that the affairs of the firm became deranged by reason of debts against it to a large amount, and in order to make a just surrender of all the effects the company assigned to Timothy Ryan, Patrick Durkin, and George Irvine, in trust for the benefit of its creditors; that Ryan, Durkin, and Irvine pray to be made parties to this bill; that a dissolution of the firm of John Collins & Co. took place, and that John Collins fraudulently carried off bonds, accounts, etc., of the partnership effects, and refused to account with the assignees, and prayed an account and decree for the sum due.

At October Term, 1821, the cause was referred to Andrew Joyner and Shirley Tisdale; and at April Term, 1822, the referees reported that the defendant had in his hands $1,293.03 due complainants, "provided John Collins is not liable under an attachment issued at the instance of Michael Sweetman against him, for payment of an action in (421) favor of the said Sweetman against McGowan & Collins for the sum of..........."

On 27 April, 1822, upon motion made to the court below by the complainant's solicitor, and upon producing the report of the referees, it was "Ordered that the report be confirmed, and that John Collins pay to the complainants the sum of $1,293.03, provided that John Collins is not liable under an attachment issued at the instance of Michael Sweetman against him, as mentioned in the aforesaid report; and if he, being liable, should pay to Sweetman the amount of the attachment, then he was to be discharged from the payment of $1,293.03 to complainants if Sweetman's attachment amounted to that sum; and if it did not, then that John Collins should pay to the complainants the sum required to make up the $1,293.03," and the clerk was ordered to tax complainant's costs against John Collins.

At October Term, 1822, the cause was continued, and at April Term, 1823, the complainants filed a petition for a rehearing, which, at October Term, 1824, was refused, and the petition was dismissed; whereupon complainants appealed to this Court.

The reference was of all matters in controversy between McGowan & Collins and John Collins.

The attachment of Sweetman was sued out in May Term, 1822.

The Attorney-General, Seawell and Ruffin for complainants.
Gaston and Hogg for defendant.

(422) Hall, J. I think the decree in this case is as final as the court intended to make it. The parties are referred to the decision of another court for its final consummation; and whether execution should

issue for one sum or another was made to depend upon that decision; and when the record from the court where the attach- (423) ment was depending (under which John Collins had been summoned as garnishee) should be produced, it would make no alteration in the decree, but merely enable the court to direct for what sum execution should issue. I, therefore, think a bill of review will lie to reverse the decree, and that the decree ought to be reversed and a decree entered for the complainants.

TAYLOR, C. J., and HENDERSON, J., concurred.

PER CURIAM. Reversed.

IN EQUITY

STREATOR v. JONES.—From Wake.

On a bill, alleging that an absolute deed executed by complainant to defendant was executed in pursuance of a contract for the loan of money, and that the land was to be redeemable by the parol contract of the parties; the Court, without meaning to contravene the rule which forbids parol evidence to contradict, vary or add to the terms of a written agreement, will yet hear parol evidence to prove facts and circumstances dehors the deed, which go to show that the true contract of the parties could not have been for an absolute conveyance; such as that the money paid was not a fair price for the *absolute purchase*, that the vendor kept possession, that an account was stated between the parties, wherein the money advanced was charged as a debt and interest thereon was stated, etc.

THE bill stated that in 1799 the defendant advanced to the complainant on loan the sum of $800; and that to secure the repayment thereof, with 25 per cent interest, on or before the expiration of that year, he executed to the defendant a deed in fee simple for divers tracts of land; that it was agreed between the parties that the lands should be redeemable on repayment of the sum borrowed, with 25 per cent thereon, at the expiration of the then current year; that upon complainant's urging upon Jones that some writing expressive of such (424) right of redemption should be subjoined to the deed, Jones said: "Here, take the money you want, and trust to my word"; that complainant did trust to his word and agreement aforesaid, and signed the deed, and continued in possession until he was evicted by defendant in 1801; that before the expiration of the year 1799 complainant informed Jones that he would not be able to comply with his contract at the stipulated time, and prayed further indulgence, to which Jones, in reply, proposed that complainant should sign a book account stating the sum of $200 to be due for the rent of that year, and at the same time promising that if he would do so he might redeem in 1800 by the payment of the principal with 12½ per cent, or in 1801 by the payment of the principal with 25 per cent; and the complainant, being ignorant and in distress, signed the account.

Some time in 1800 a payment of $100 was made for complainant to defendant by one Powell in part of the redemption of the land, and Jones then agreed that if within the first five weeks of 1801 the complainant would pay him the further sum of $600, and give bond and security for the balance, that he would release the land; or, if within that time he could not make such payment, that he would wait another year for the payment and during that year be content with lawful interest; that in the course of the five weeks mentioned above the complainant, by one Reading Jones, offered the defendant $500, and to pay the remaining $100 in one month, if he would surrender the deed; this Jones refused, but said he would see about it at court, which was to meet in a few days; and at the court Jones caused the deed to be recorded, and then told Reading Jones, who offered to pay the $600, that he need not trouble himself any more, for that the lands had been sold by him (the defendant) and that the complainant would never get them again.
(425) Complainant then applied to Jones himself, offering to pay the $600 and to secure the remainder by bond with security, when Jones replied that he had sold the land, and offered the complainant a small pecuniary compensation for his equity of redemption; this was refused by complainant, and Jones then evicted him by means of a jury upon a complaint of forcible detainer. The lands were sold to one Martin Lane, who, it was charged, had full notice, and who paid no consideration.

The bill prayed that the sum due, with interest thereon, might be ascertained under the direction of the court, and upon payment thereof that defendant should be decreed to reconvey the lands.

The answer of Jones set up an absolute purchase of the lands, and denied that there was any agreement for redemption, and, admitting the fact that complainant remained in possession until 1801, alleged that his possession was that of a tenant only, under an agreement to pay a certain rent annually so long as he continued in possession. A promise to "resell" to complainant, made afterwards, was also admitted, but at what time was not stated.

The defendant Martin Lane answered that he was a purchaser for valuable consideration, without notice of complainant's claim.

There was much evidence in the case, and the facts shown by the depositions, so far as is necessary to a correct understanding of the points decided, will be found in the opinion of the judges.

Ruffin and Hogg for complainants.
Gaston and Seawell for defendants.

HALL, J. The bill charges that the money received from the (431) defendant Jones was a loan and not the price of the land, and that the land was to be mortgaged as a security for the debt; that when complainant was about to execute the deed he expressed a wish that a clause of redemption should be inserted in it, but that the defendant objected, and said: "Here take the money you want and trust to my word," and that the defendant refuses to either receive the money or reconvey the land.

From this statement the justice of the case seems to be with the complainant, and relief ought to be granted, unless there is some rule of law founded in policy that forbids it.

It is objected that the contract of the parties is evidenced by (432) the deed executed by the complainant to the defendant Jones and that parol evidence ought not to be received to contradict it; and that that principle was established in the decision of this Court which took place on the same point in July, 1810, *Streator v. Jones,* 5 N. C., 449. With respect to that decision, I think my recollection serves me when I say that the decision of a majority of the Court was not as is laid down in that case. I know that the Court did strongly incline against the introduction of parol evidence to prove directly that the deed executed to Jones was a mortgage, but did not doubt but that circumsances might be given in evidence from which a jury might infer that the deed was considered by the parties as a mortgage and find a verdict accordingly; such as the value of the land at the time of the contract, the sum of money paid for it, the rent paid or agreed to be paid by complainant during the time he afterwards lived upon it. And I am supported in this from this further fact that, shortly after that decision was made, an issue was made up on this very point in the Superior Court of Wake County, where the cause was pending, and submitted to a jury. The question submitted was whether the deed was a mortgage or not. There was a mistrial. The question before that jury is the one now before this Court. It may further be observed that the same counsel appeared for the parties in both courts.

With respect to the objection that parol evidence ought not to be received to contradict or control a written instrument, as a general principle or rule of law its correctness is admitted. It is also admitted that when the parties undertake to embody their contract in writing, and really do so (unless there is fraud, etc., in the case), it cannot nor ought it to be disturbed by parol evidence. The question, then, here is, Was the contract of the complainant and the defendant Jones committed to writing, or was there any other contract made at the time than what the deed sets forth? I think there was; because the complainant was (433) a needy man. The disproportion between the value of the land and the money received for it, the high rent which complainant agreed to give for it, and his remaining in possession so long as he did after the sale; before complainant signed the deed he wished a clause of redemption inserted; Jones said he had given full value for the land; complainant answered that he would not take three times that sum for it. After he signed the deed Jones told him if he would return the money, that was the $800 which he was about to give him, at the end of the year, together with $200 rent, that he might have the land again. This surely does not appear like a serious and *bona fide* purchase of the land by Jones. Had this money been paid at the end of the year by complainant it would have been paying Jones his principal and 25 per cent interest, which the bill states the contract to have been. At this rate the purchase money would have been swallowed up in the rent due in four years. And it must appear a little singular that $200 rent should be paid for land that was only worth $800. As to the value of the land, the testimony is contradictory. It appears from some of it that the land was worth, in 1799, 75 cents per acre; that in 1804 it was worth $1, without the improvements put on it by Lane, who purchased from Jones. From this testimony the land was worth 25 cents per acre more in 1804 than it was in 1799, notwithstanding timbers had been taken from it by Streator while he lived on it, and by Lane, who lived on it afterwards up to that time. It appears from other testimony that the land in 1799 was worth $2.50 per acre, and from other testimony $3 per acre. A mean valuation between the two extremes would be nearer thrice than twice the sum for which Jones says he purchased it. But it is asked, Why did the complainant execute the deed under these circumstances? And it is argued that, as he has done it, he must be bound by it. My answer, is, he was a needy man. Jones was the lender and he was (434) the borrower; as *Lord Mansfield* observes, he was the slave of the lender. Doug., 672, note. Borrowers are oppressed men; and their necessities oblige them to submit to any terms. Ca. Temp. Talbot, 41. Under such circumstances it will not do to take shelter under the maxim, *Volenti non fit injuria;* they are not in *pari delicto.* 1 Ves., 319.

In *Barnell v. Sabine,* 1 Vernon, 268, which happened before the statute of frauds, etc., in England, the single question was mortgage or no mortgage; and the court received evidence of the value of the land; that the purchase money was 950*l.*, that the defendant was offered about the same time 1,400 *l.;* and to prove that such evidence was sufficient to make it a mortgage they cited two cases, *Cole v. Martin* and *Beale v. Collins,* neither of which cases I have been able to find. The chancellor dismissed the bill, not because he would not hear parol evidence, but because the evidence when heard did not convince him that the deed was originally a mortgage. In another case, since the statute of frauds, Ca. Temp. Talbot, *Cottrell v. Purchase,* the same question arose, whether a deed absolute on the face of it was intended by the parties to be a mortgage, and in that case evidence was given as to the purchase money and as to the value of the land, which was deemed by the chancellor not sufficient proof that the deed had been originally considered by the parties as a mortgage; but he added: "Had complainant continued in possession any time after the execution of the deed, I should have been clear that it was a mortgage; but she was not, and her long acquiescence under the defendant's possession is to me strong evidence that the deed was an absolute conveyance." These cases are introduced, not for the purpose of showing the final decrees of the chancellors, but to show that they permitted parol evidence to be given to prove that deeds absolute on the face of them were by the original contract considered by the parties to be mortgages. In the last mentioned case of (435) *Cottrell v. Purchase* the chancellor concluded by saying that they who took an absolute conveyance of an estate as a mortgage are guilty of a fraud; for which he cited Bacon's Tracts, 37. In Prec. in Chancery, 526, it is stated that when the lender having an absolute conveyance refused to execute a defeasance, *Lord Nottingham* decreed it against him on the fraud, after the statute of frauds.

In that case the decree was made on the ground that he refused to enter into a written agreement to reconvey as the statute required, after having agreed to do so. In this case relief is prayed because the defendant refuses to reconvey after having by parol contract agreed to do so, the statute of frauds not having been in force at the time of the contract. Another case in the same book, 526, was where an absolute conveyance was made for a sum of money, and the person to whom it was made, instead of entering and receiving the profits, demanded interest for his money and had it paid him. This was admitted as evidence to explain the nature of the conveyance. This decree was made on the same kind of evidence as that objected to in this case. The only doubt entertained by the judges in this and other cases of the like kind seemed to be whether the statute of frauds stood in the way or not; for Powell, in his treatise on Mortgages, 200, where the last mentioned case is also noticed, makes this remark: "In such cases the proof offered is not considered a variation of the agreement, but explanatory only of what it was meant to have been; and the allowing of any other construction upon the statute of frauds and perjuries would be to make it a guard and protection for fraud, instead of a security against it, which was the intention of it." I have before stated that when this contract was made there was no statute of fraud and perjuries in force in this State.

In consequence of this statute the English judges have rejected (436) parol evidence offered to control written contracts (unless they have been procured through fraud, etc.) because a parol contract is void under the statute, and it cannot be established in part by written and in part by parol evidence, more than if it all rested on parol evidence. As in *Woolain v. Hearne,* 7 Ves., 217, a bill was brought for a specific execution of an agreement for a lease at a less rent than was mentioned in the written agreement, and the variation was sought to be proved by parol evidence. The master of the rolls said "that the statute had been too much broken upon by supposed equitable exceptions," and that he would go no further in giving effect to parol evidence than he was forced to do by precedents. He dismissed the bill, but said that the evidence made out the complainant's case. As coming nearer to this, however, notwithstanding the statute of frauds, I must notice *Pember v. Matthews,* which came before *Lord Thurlow.* A bill was brought by the original lessees of a leasehold estate against the assignees of the lease, for the specific performance of a parol undertaking to indemnify the complainants against all rents and covenants to be paid or kept on the lessee's part towards the original lessor, and to execute a bond for securing such indemnity; the assignment had been by sale and auction, and the conditions of sale did not state the indemnity. It was objected that parol testimony was inadmissible on the ground that when the parties have entered into a written agreement no parol evidence can be admitted to increase or diminish such agreement. *Lord Thurlow* said, "The rule of law is right, but when the objection was *originally* made and *promised* by the other party to be rectified, it came among the string of cases, 1 Eq. Ca. Ab., 230-1, where it is considered a fraud upon the rule of law," and ordered it to go to law upon an issue whether there was such a promise on the day of the execution of the assignment of the lease; and upon the trial the jury found there was such a promise, and complainant had a decree for a specific performance. If this (437) case was decided on the ground of fraud, I think the case before us is not altogether clear of it.

I cannot think that *Lord Irnham v. Childs,* 1 Brown, 92, is an authority for the defendants. In that case it was agreed that the annuity should be redeemable; but the parties thought that if there was a clause of redemption inserted it would make it usurious, and for that reason it was agreed that such a clause should not be inserted. *Lord Thurlow* said there was no fraud in that case, and refused to relieve the parties upon parol evidence; but said that if it had been intended to be inserted, and had been suppressed by fraud, he would not refuse to hear the evidence.

It is observable in this case that the parties intended to evade the statute of usury. They were both in *pari delicto.* The same remark may be made as to the cases in Brown, 168; 1 Ves., 241. Cases are not wanting on this subject in the United States. In *Ross v. Merrell,* 1 Wash., 14, the bill was brought to redeem negroes conveyed to the defendant by an absolute bill of sale; parol evidence was received to prove that it had been executed as a mortgage. The Court said they had the less difficulty in receiving it as the complainant had remained two years in possession of the negroes after the conveyance. And in *Robertson v. Campbell,* 2 Call., 421, the complainant had conveyed by absolute bill of sale certain slaves to the defendant; parol evidence was received to prove that it was the intention of the parties that the slaves should be redeemable, and the Court, believing the evidence, decreed for the complainant. See, also, *Sadler v. Greene,* 14 Va., 101, and *King v. Newman,* 16 Va., 40, decided upon the same principle, notwithstanding, as I understand, the statute of frauds, etc., in force in that Commonwealth.

In 1 Johnson Chancery, *Boyd v. McLean,* the plaintiff pur- (438) chased of Golden a tract of land, and borrowed of the defendant the money to pay for it, and directed Colden to convey the land to the defendant as a security for the money, which was done by an absolute deed; the money was tendered and a bill filed praying a conveyance of the land; the defendant relied upon the statute of frauds. *Chancellor Kent* decided that it was a resulting trust excepted out of the statute of frauds, and that the fact whether the purchase was made with the plaintiff's money might be proved by parol evidence.

In this case the complainant did not procure a third person to convey the lands as a security to the defendant, but he conveyed them himself as a security for the debt. In both cases the lands were held as a security for the debts, but by deeds absolute on the face of them. If resulting trusts are excepted out of the statute, other trusts may be proved by parol evidence when unshackled by any statute. See, also, 1 Johnson Chan., 273; 2 *ibid.*, 274, 405, 585, 630. In 1 Day's Cases, 139, parol evidence was held admissible in equity to show that an absolute deed was intended as a mortgage. 2 Day, 137. See, also, note to Co. Lit., 205a, note 96.

I have said that the evidence in this case convinces me that the deed in question should be considered as a mortgage, because I think it was understood by the parties that the land was redeemable; and I have come to this conclusion from the evidence given in the case. Although the evidence proving directly the declaration of Jones is not much to be relied upon, yet it is corroborative of other evidence as to the value of the land, the possession kept afterwards by Streator, and the rent charged, etc., as well as the needy situation of Streator. And I am also of opinion, from the authorities examined in this case, that it is proper the evidence should be received in reference to the deed from Streator to Jones.

I will take another short view of the case, in regard to the objection that the evidence contradicts the deed. Let it, then be admitted (439) that Jones loaned, or agreed to loan, $800 at 25 per cent interest, or at any other per cent; that it was further agreed that Streator should convey to Jones his land in *fee simple* as a security for the debt; and it was further agreed that when Streator should replace the money with interest (provided he did it in twelve months) Jones should reconvey the land to Streator, and that such contract rests altogether on parol evidence, and that the statute of frauds, etc., was not in force, and that parol contracts are obligatory upon the parties; and let us suppose that in part execution of the contract the land is conveyed to Jones and the money advanced to Streator; can it be said that the deed embraces the whole contract? or can it be said that the deed contradicts that part of the contract which provided for redemption? It has never been considered that a defeasance and an absolute conveyance will not stand together. It seems to me that in such case the execution of the deed is a part execution only of the contract, and that the residue of the contract remains executory. And this I say without impugning what I have before admitted, namely, that a written contract shall be obligatory, when it appears that it was the intention of the parties to commit the whole contract to writing, and there is no allegation of fraud, etc.

HENDERSON, J. It is unquestionable that written evidence is more certain than mere oral testimony, or, as it is commonly called, parol evidence. Hence follows the rule, which seems to be very generally admitted, that what is written shall not be contradicted, controlled, enlarged or explained by mere parol, unless it is *shown* that it is *so* written through fraud or by accident; which latter term embraces mistakes, surprise, or the like. There equity relieves upon a principle of equitable jurisdiction, not upon the writing, but on a thing, to wit, the fraud or accident *dehors* the writing, as *Lord Thurlow* expresses it in *Irnham v. Childs,* 1 Brown, 92; for equity relieves in cases of fraud, acci- (440) dents, and trusts. But the fraud here meant is not the fraud in not *observing* the contract, but that fraud by which the writing is made to speak a language *different* from the agreement; otherwise, it would afford a ground of relief in all cases, and to obtain relief in such cases such a case must be made in the bill and, of course, supported by the proofs. But the great difficulty is to ascertain what is here meant by the written *agreement*. Is it confined to those writings professing, as it were, to evidence the written agreement, or does it embrace writings made for other purposes, *diverso intuitu, ex gratia* to execute them, and if the latter, to such of them as contain direct expressions of the agreement; or where the parol agreement is so inconsistent with the written agreement that both cannot stand together, or where such contradiction is not absolutely repugnant to or inconsistent with the writing, but the contradiction only a probable inference. The authorities are somewhat contradictory on the subject, and I have not the vanity to believe that I can reconcile or explain them by any examination that I could make of them. Nor do I deem it necessary in this case. But where the writing is of this latter description, and the parol evidence is not absolutely contradictory and repugnant to the writing, but the contradiction only a probable inference from the writing, I think that *facts* and *circumstances* may be shown by parol. Whatever may be the law as to mere parol declarations is too well established, I think, by all the authorities, both ancient and modern, to be now questioned. They are collected by Mr. Buller in his note in Co. Lit., page 205a, note 96. They prove the correctness of his observation, that wherever a conveyance or an assignment of an estate is originally intended as a security for money, whether this intention appears from the deed itself or any other instrument, it is always considered as a mortgage, though there is an express agreement of the parties that it shall not be redeemable, or that the right of redemption shall be confined to a particular time, or to a partic- (441) ular discription of persons. He then observēs (which is to the point in this case) that "In many of these cases the courts have found it necessary not only to apply their general principles, but to determine the fact whether the conveyance was intended as an absolute sale or only as a security for money. If the money paid by the grantee was not a fair price for the absolute purchase of the estate conveyed to him; if he was not let in to the immediate possession of the estate; if instead of receiving the rents for his own benefit he accounted for them with the grantor, and only retained the amount of the interest; if the expense of preparing the conveyance was borne by the grantor: each of these circumstances has been considered by the courts as tending to prove that the conveyance was intended to be merely pignorititious." The cases from which he draws his observations are there cited, and they fully support him; and this seems to me to be conformable to principle. That it was not to be redeemable is matter of inference, not only expressed so in the deed, but inferred from it, on the presumption that if there had been such an agreement the deed would not have been absolute. But this is not entirely inconsistent with the deed, but only a very strong probability, which it would be impossible to overturn by proof of inconsistent parol declarations; for they are liable to be misunderstood, forgotten, or misrepresented by fraud or perjury, or set up, where there was nothing of the kind, and are incapable of disproof. But facts from which the inferences are to be drawn are not more liable to these objections than almost all human things. There are some acts which, if done with deliberation, such as the one mentioned by *Lord Talbot* in *Cottrell v. Purchase*, Cas. Temp. Talbot, 63, as settling an account wherein the money advanced is charged as a debt, and interest (442) stated. Now, it is possible that an absolute conveyance may be intended only as a mortgage or security for money; but it is impossible that there can be an absolute purchase and yet the purchaser retain the price. They both cannot stand together; the possibility yields to the impossibility; the absolute conveyance to the mortgage; for an absolute *conveyance* and intended as a mortgage, it may be; but an absolute *purchase* and mortgage it cannot be. I wish it to be distinctly understood that I express no opinion on principles which I have not used to decide this case; for as to them I have not pushed the inquiry far enough to form an opinion on which I can confidently rely. But this much I will observe, that in the old cases there was too much laxity permitted in the introduction of parol evidence to interfere with written contracts. Writing then was not so common as at present, and their very inheritances were conveyed by mere words accompanied by livery of seisin, all which might be, and was very often, done without any writing at all. On the contrary, of late, since the statute of frauds, there has been too much strictness in excluding it, as we are apt to run into contrary extremes; and the legal notions of the lawyers of England have been insensibly affected by the operation of that statute, which places parol evidence in the background, and in many instances it has been said that independent of the statute parol evidence would be in the background, when in truth the notion of its inferiority was insensibly produced by the statute in the manner before mentioned; and it being of no moment how it was produced, provided it was so, the matter passed off without further examination. And even in this State, where we had no statute of frauds until very lately, the same effect has been, in a minor degree, produced; for we get our legal notions, or most of them, from English authorities, and principally from those written since the passage of the statute of frauds, and particularly as to the rules of evidence. This case was before the late Supreme Court in 1810, 5 N. C., 449. I was a member of the Court and concurred with a majority that mere parol declarations should not be received to contradict the deed. I did not doubt then, nor do I now, that facts might be (443) shown by parol from which it might be inferred that it was intended only as a security for money. In this opinion *Judge Locke* concurred. I have no distinct recollection of *Judge Lowrie's* opinion. The Court was composed of *Judges Taylor* (the present Chief Justice), *Hall, Locke, Lowrie,* and myself. *Judge Wright,* I think, was absent.

From my view of the case I do not deem it necessary to examine the ground taken by the gentleman who closed the argument, to wit, that although the parol declarations were not admissible to prove the transaction to be a mortgage, yet they were to prove it usurious. This was incomprehensible to me. I cannot, therefore, acquiesce in it, although I do not know that I can detect the fallacy of his very ingenious argument. But I have too much experience of the extent of the powers of my own mind not to have perceived that the arguments, the fallacy of which I cannot detect, do not always lead to the truth; and when to my understanding they tend to establish something contrary to what I have arrived at by a plain and simple argument, I conclude there is error in the argument, although I cannot point out where it lies.

This transaction cannot be made a loan without making the conveyance a mortgage; for if it was an absolute purchase, the lands passed to Jones and the money to Streator; there was no debt to forbear. The evidence must, therefore, be admitted to prove the mortgage; and if the evidence is admissible to prove it a mortgage to entitle the party to redeem, it appears to me to be admissible to prove the same fact for any purpose. If mortgage deeds were void, evidence to show it a mortgage would be admissible. But mortgage deeds are not void; only usurious mortgage deeds are void. Then as to the evidence, in which I do not take the parol declarations into consideration further than Jones admits them in his answer. The question then is, do the facts proven, taken in connection with Jones' two answers, (444) show the conveyance to be intended as a security for money? I think they do. (1) As to the value, the witnesses differ from 75 cents to $2.50 and $3. I am disposed to believe that the higher valuations are nearer right, first from the amount of the rent, as admitted by Jones; the estimate made of the injury done by Streator in two years, to wit, $400, and the estimate made of the injury done by Streator and Lane, $1,000; the amount for which Jones sold the land two years afterwards, to wit, $1,200; and the two years rent, to wit, $400, making in all $1,600. Now, it is impossible well to perceive how this estimate made by the witnesses Hunter and Sugg, could be correct, to wit, $975, and yet the land in so short a time, without any convulsions in nature, or any other particular cause, received an injury of $1,000, particularly when the $975 estimate is supported only by two men, one of whom says that the land without the wood is worth nothing, and the other only 25 cents. With this estimate as to value, taken in connection with the rent, I am of opinion that the land was worth $2,600 or more. This disparity, together with amount of rent, and Streator's retaining possession, with Jones' answer to this bill, and another answer of his read on the hearing in another suit between Streator and himself, satisfy me that Streator never would have signed the deed unless it was understood, and formed part of the contract, that upon the repayment of the money he was to have the land again. Such total disregard of value, and the sacrifice consequent thereon, are contrary to the principles which almost invariably govern human actions, which, with the high rent and Streator's retaining possession, countervail any inference which can be drawn from the absolute form of deed. And, in truth, I think that such inference is supported by Jones' answer. He admits in it that an after-promise was made (but when, he cautiously conceals) that he would (445) resell, as he calls it. These resales, particularly when made immediately after the execution of the title deeds, should be strictly scrutinized. They are most frequently mere shifts or devices to cloak the real nature of the transaction and evade the statute against usury. They form at least one link in the chain. But the object of the bargain was not to acquire the property, but to make a profit of money; not that a person may not use his money to his profit and its increase by buying and selling, but it must be a real sale and transfer of right which, from their very nature, is not to be presumed; for why should a person really and *bona fide* purchase the property and in a moment after, without any cause, and before that foible of our nature, proneness to change, could exert its influence, part with it again? It is said the motive was to make money. It is admitted, and was so understood before the contract was closed, and formed part of it; and it is true there may be upon principle a sale made under such circumstances; but I have never known one, and they are so rare that I have never known a person who had. We have a full-drawn likeness of one in Jones' second answer, and if they be as he has drawn them, I wish never to witness one. But with all the aid of able counsel, the features of usury and oppression could scarcely be concealed; and if he means the same thing in his answer to this bill by a resale, as he did in that—and it is quite fair so to presume, for I believe he was the same being in both—very little evidence, much less than that offered in this case, would be sufficient to show the transaction to be a security for money only.

As to the other defendant, Lane, my impression is that he stands in the same situation as Jones, but it is not so strong that at present I would decree against him. In his favor he has the express declaration of Streator that Jones had a right to sell, and that if he, Streator, did not pay that year he gave up. Notice that Streator set up claim is sufficient, and if he undertook to judge of its validity, he did so at his peril; and I rather think he should not protect himself (446) by an exposition of the contract (not a false statement of facts by Streator) which misled him, Lane, by a needy, necessitous man, and whose whole estate was under mortgage to the person whose vanity it flattered and whose pride it swelled. I say that I am not satisfied that he is protected by such means. He does not appear to be a *bona fide* purchaser; but at present I am not prepared to say that he stands in the place of Jones. Retain the bill also as to him for further directions.

Taylor, C. J., *dissentiente:* From the case made by the bill, the allegations of which it is not necessary to repeat, the complainant can only be relieved by being allowed to show, by parol evidence, that the deed, though absolute on its face, was redeemable; or that the defendant agreed by parol to reconvey upon repayment of the sum borrowed. I have understood the rule to be settled, both at law and in equity, that parol evidence is not admissible to disannul and substantially vary a written agreement. Nearly a century ago it was said by *Lord Hardwicke* that to add anything to an agreement in writing, by admitting parol evidence, is not only contrary to the statute of frauds and perjuries, but to the rule of the common law before the statute was in being. 2 Atk., 383. In the last branch of the proposition he was supported by decisions made before the statute of frauds, 5 Coke, 25 b, 3 Lev., 234, and by many since which have been cited in the argument, particularly that leading one of *Meres v. Ansell,* 3 Wils., 275. The same doctrine has been more recently stated and confirmed by another chancery judge of preëminent learning, *Sir William Grant,* whose words are: "By the rule of law, independent of the statute, parol evidence cannot be received to contradict a written agreement. To admit it for the purpose of proving that the written instrument does not contain the real agreement would be the same as receiving it for every purpose. It was for the purpose of shutting out (447) that inquiry that the rule of law was adopted. Though the written instrument does not contain the terms, it must, in contemplation of law, be taken to contain the agreement, as furnishing better evidence than any parol can supply." 7 Vesey, 219. These authorites, selected from the numerous decisions on this subject, seem conclusively to establish the general rule that where there is a solemn deed or agreement in writing no parol agreement can be set up to alter or vary, in any manner, the written contract. Nor can I discern any circumstance in the case made out by complainant to bring it within any of the exceptions to the general rule. Those exceptions are that extrinsic evidence is admissible to prevent fraud, to correct mistakes, or to protect against surprise or accident. It is material to observe that neither fraud, mistakes, or accident are alleged in the bill; but an agreement, by the mutual consent of the parties, to leave out, or not annex to the deed, a defeasance or clause of redemption. It was said by the chancellor, in *Lord Irnham v. Childs,* 1 Bro. C. C., 92, that if the agreement had been varied by fraud, parol evidence would be admissible; that if the bill had stated that the clause was intended to be inserted, but it was suppressed by fraud, he could not refuse to hear evidence read to establish the rule of equity. As it was, the parties omitted a provision in a deed on the impression of its being illegal, and having trusted to each other's honor, they must rely upon that, and cannot require the defect to be supplied by parol evidence. In *Lord Portmore v. Morris,* 2 Bro. C. C., 219, the evidence went to prove that it was part of the agreement for an annuity that it should be made redeemable; but such agreement for redemption making no part of the written contract, the master of the rolls observed "that if fraud had been imputed, the evidence might have been admitted, but that it was dangerous otherwise to depart from the deeds. It (448) might be the intention that the annuity should be redeemable, but he could only get at it by demolishing one of the foremost rules of law. He would, therefore, reject the evidence." *Hare v. Sherwood,* 1 Vesey, Jr., 241, was decided on the same principle. From all the cases the principle may be inferred that is not sufficient merely that the evidence goes to establish fraud, or that it may be concluded from the circumstances of the case, such as inadequacy of price, the continuance of the vendor in possession, etc., but the bill must contain a distinct and positive imputation of it; otherwise, the defendant is surprised by the case set up by evidence which was not made by the bill. The court may add a trust or a clause to an absolute deed where the omission or suppression has been occasioned by fraud or misrepresentation; they will place the contract in the shape it would have assumed if no imposition had been practiced. But when the party seeking relief negatives the fraud by placing the omission to the account of an understanding and consent on both sides, I cannot perceive how relief can be given to him without admitting that a contract may rest partly in a solemn deed and partly in a parol promise, and that the latter shall be enforced to the overthrow of the former, although fairly made. And it will be seen in those cases even where fraud was imputed, and the court cannot reject parol evidence to establish it, however cautious they are in giving effect to it, where the object of it is to set aside written instruments. In *Hutchins v. Lee,* 1 Atk., 447, a bill was filed to set aside the assignment of a leasehold estate, upon a suggestion that the same was never intended as an absolute assignment, but was meant to be subject to a trust for the benefit of the complainant. The terms of the deed itself were much relied upon as furnishing evidence that it was not intended as an absolute assignment, and as tending to confirm the external evidence. Upon a view of all the authorities, I find the conclusion irresistible that parol evidence of the promise to reconvey ought to be rejected; and I will next inquire whether it is proper to consider the (449) circumstances attending the transaction in order to arrive at the conclusion that the absolute deed was subject to a redemption or repurchase. It appears to me to be equally within the mischiefs which the rule of evidence intended to guard against to construe an absolute deed to be conditional, upon the proof of extrinsic circumstances, which are still established through the medium of parol evidence. The parol proof may still misrepresent or mistake the circumstances as much as if it were introduced directly to alter or disannual the deed; and it is the danger of impairing the force and effect of a written contract by inferior evidence that the law seeks to avoid. This case furnishes a remarkable illustration of the danger of resorting to circumstances; for the testimony respecting the value of the land, a most important fact in the decision of the question of mortgage or no mortgage, is absolutely irreconcilable. Nor have I found any cases on this branch of the question which either did not come within the exception of fraud or mistake or where there was not some writing signed by the vendee at the time of the contract, admitting the true nature of the agreement, or some statement of accounts or calculations authorizing a clear reference to it. It is stated in a note of 2 Fonblanque, 262, that parol evidence is admissible to show or explain the real intention and purpose of the parties, though the conveyance be absolute; and for this he cites *Maxwell v. Montacute,* Prec. Ch., 526; *Walker v. Walker,* 2 Atk., 98, and *Joynes v. Statham,* 3 Atk., 338. The first case, as it is reported in 2 P. Wms. and 1 Strange, was a bill to enforce the specific performance of a parol promise made before marriage to execute a marriage settlement; there was a plea of the statute of frauds and perjuries, which, upon the circumstances of the case, was ordered to stand for an answer. But much reliance is placed by the chancellor upon the defendant's having written a letter after the marriage acknowledging the promise. The ground of the (450) decree subsequently made was that the promise was intended to be reduced into writing, but was prevented by fraud. In *Walker v. Walker* the defendant was allowed to read parol evidence to rebut the equity set up by the bill; the chancellor saying it was not properly evidence in support of an agreement, but a defense arising from the fraud and imposition of the plaintiff. In *Joynes v. Statham* the object of the bill was to carry an agreement into execution for the lease of a house signed by the defendant only, upon the face of which agreement the plaintiff was to pay a sum of 9*l.*, and it was insisted by the defendant that it ought to have been inserted in the agreement that the tenant was to pay the rent *clear of taxes,* but that the plaintiff having written the agreement himself, had omitted this part of the contract. The evidence was admitted by the chancellor, who likened it to the case of a mortgagee bringing a bill to foreclose where no proviso for redemption was inserted, and the mortgagor was a marksman, and of a mortgage by an absolute conveyance and defeasance, where the defeasance was omitted to be executed by the mortgage; in both which cases evidence of *the omission by mistake* should doubtless be received. The cases referred to in Harg. Co. Lit., 203, appear to me liable to the same observations. The two last cases are where the evidence was offered on the part of the defendant, and must be referred to the latitude allowed by courts of equity to parol evidence, where it is offered to resist an application for a specific performance, especially where it discloses a ground of fraud. When the court is called upon to grant extraordinary relief, resting in its discretion, it will always refuse it if the justice of the case is on the side of the defendant.

Whether parol proof be admissible on the part of the plaintiff, who seeks specific performance of an agreement in writing, and also wishes to vary it by parol proof is much considered in *Woolman v.* (451) *Hearn,* 7 Ves., 211, in which it was rejected, though if the parties had been reversed it would have been admissible. *Higginson v. Colans,* 15 Ves., 516, and *Clinin v. Cooke,* 1 Shoal & Lefroy, 39, are to same effect. Nor do I feel myself at liberty to put any construction upon the deed which shall give it a different character or effect from what it bears upon its face, in consideration of their contract entered into by the defendant, of a similar character, which he considered as mortgages; for I understand it to be a well settled rule of law that in the construction of a deed, or agreement, the acts of the parties cannot be taken into consideration.

The language of the deed is clear and unequivocal, and admits of but one exposition; nor can that be varied, because the parties have acted under it, or others of a like import, as if it were a mortgage. In *Clifton v. Walmsley,* 5 Term, 564, it was held that where the lessee of a coal mine covenated to pay a certain share of all such sums of money as the coal should sell for at the pit's mouth, he was not liable under that covenant to pay to the lessor any part of the money produced by sale of the coal elsewhere than at the pit's mouth, and that evidence of the lessee's having accounted with the lessor, and paid him the share of money produced by the sale of coal elsewhere is not admissible to explain the intention of the parties. There are several cases to the same effect, both in law and equity, and the doctrine affords an additional safeguard to the authority and efficacy of deeds. *Baynham v. Hospital,* 3 Ves., 295; *Eaton v. Lyons,* 3 Ves., 290; 2 New R., 452.

Another ground taken by one of counsel for the complainant was that as the deed was founded on an usurious consideration it was void, and on that account ought to be set aside. Whatever weight there might be in this objection to the deed, if properly brought before the court, it is not necessary to decide, because I think it is to be seen that this mode of relief was not the one which the bill in its original structure sought for. The bill shows that the relief expected was to obtain (452) a reconveyance of the land upon the strength of the parol evidence. A reconveyance is the relief prayed for in the bill, whereas when instruments are absolutely set aside for fraud there ought not to be a reconveyance. 2 Ves., Jr., 287. Nor is the bill framed with a double aspect, either to reconvey or set aside the cenveyance in the event of its being declared usurious. Another circumstance showing strongly that such was not the object of the bill is that the only terms upon which equity will decree an instrument founded upon an usurious consideration to be delivered up and canceled are the plaintiff's paying to the defendant what is really due to him. The omission of such an offer in the bill is a ground of demurrer. 1 Fonb., 45. There is nothing on the face of the proceedings to apprise the defendant that the deed would be attacked on this objection; and the voluminous evidence taken in the cause, directed to the other points made by the bill and answer, shows the understanding of the parties. The best consideration I have been able to give this case has led me, individually, to the conclusion that the bill ought to be dismissed.

PER CURIAM. Affirmed.

Cited: Smith v. Brown, post, 587; *Poindexter v. McCannon,* 16 N. C., 376; *Jackson v. Blount,* 17 N. C., 557; *McLaurin v. Wright,* 37 N. C., 97; *Blackwell v. Overby,* 41 N. C., 45; *Kelly v. Bryan, ib.,* 287; *Watkins v. Williams,* 123 N. C., 174; *Porter v. White,* 128 N. C., 43; *Sandlin v. Kearney,* 154 N. C., 605.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

JUNE TERM, 1825

THE PRESIDENT, DIRECTORS AND COMPANY OF THE BANK OF THE UNITED STATES v. LANE.

The rule that notice to a distant indorser should be sent to the postoffice *nearest* to his residence, was founded on the presumption that the information would most speedily be given in such way; but the rule is subject to modification; and the true inquiry is, was the notice directed to that postoffice which was most likely to impart to the indorser the earliest intelligence, though it may not be the nearest; if it was, it is sufficient.

ASSUMPSIT, brought against the defendant as indorser of a promissory note made by one Harvey, dated 10 July, 1821, and payable sixty days after date at the office of the plaintiffs in Fayetteville.

At the trial, which was had in the court at CUMBERLAND before *Daniel, J.*, the question was whether the defendant had been fixed by due notice of the dishonor of the note. To show the notice, the plaintiffs offered in evidence the protest of a notary public, the substantial parts of which were that he, the notary, on 26 September, 1821, presented the note at the office at which it was payable, and made demand, etc., and the same, not being paid, he protested, etc.; and the protest (454) then stated that "on the same evening, by letter addressed to I. Lane, Asheboro, Randolph County, N. C., which he deposited in the postoffice at Fayetteville, the indorser was informed of the default of the drawer, and that he would be held responsible for its payment." The following facts then appeared in evidence: The mail to Asheboro goes by the way of Raleigh to Asheboro (Randolph Courthouse) on the Monday following the protest; that Lane, the defendant, was the high sheriff of Randolph County at that time, and that the Superior Court of the county began its sitting on the same Monday on which day the mail would arrive at Asheboro. The defendant was in the habit of attending the Superior Court in person during the whole term. The defendant lived 18 miles from Asheboro, and within 3 or 4 miles of the postoffice at Long's, where the mail arrived once a week from Raleigh by Chapel Hill, and then proceeded to Lexington. Some letters directed to the defendant at his office had been sent to him by the postmaster as opportunities offered. Lane was not in the habit of sending regularly for his letters to this office, but sometimes his servant, when he went to Long's mill, would call for them.

Upon this evidence, the presiding judge instructed the jury that the plaintiffs should give the defendant notice in a reasonable time of the demand and nonpayment by the drawer; but if notice was given by letter sent by the next mail directed to the indorser, it would be sufficient where the indorser lived at the distance that it had been proved the defendant did. But it was the duty of the plaintiffs to make reasonable efforts to ascertain where the indorser lived and send the letter to that office where it was most probable he would get the earliest intelligence of the transaction. If from the evidence they should be of opinion that the defendant would have gotten the letter at an earlier day by its being directed to Long's office instead of Asheboro, then they should find (455) for the defendant; but if they should be of opinion that he would or might have received the letter at the courthouse as early or earlier than he would at Long's post office, then they should find for the plaintiffs. That the question was, Did the plaintiffs use due diligence and give the defendant notice in a reasonable time?

The jury, under these instructions, found a verdict for the plaintiffs. A motion was made for a new trial on the ground of misdirection, and overruled; and judgment being rendered for the plaintiffs, the defendant appealed to this Court.

TAYLOR, C. J. The circumstance that the defendant was sheriff of the county and in the constant habit of attending the courts the whole time of their sitting would seem to make it likely that a letter directed to Asheboro would reach him sooner than one directed to Long's. At the former place he was on the spot for a week at a time, and from his public duties must unavoidably have been under the necessity of calling at or sending to the post office. At the latter place his servants only occasionally called as they went to mill, and the postmaster would only send letters to him as opportunity offered. This view of the case derives additional strength from the fact that the Superior Court began on the Monday following the date of the protest, and that on that day the mail bearing the notice would arrive at Asheboro where the defendant then was. It would be laying down a rule of very embarrassing, if not impracticable of application in this State, to compel indorsees to ascertain the nearest office, however obscure, to the indorser's abode, while there was a public and known one at the courthouse to which his business led him frequently. There are so many of these petty offices scattered through the State, some of which glimmer for a short period and then go out, that the inquiry into their existence would occasion more delay than sending the notice at once to a well established office (456) in the same county. The rules established on this subject, however just and convenient in commercial cities, can scarcely be usefully applied to the transactions in this State, where the parties reside at points remote from each other. But even when the rule was laid down that the notice must be sent to the postoffice nearest to the party, it was for the sake of carrying information to them and upon the presumption that the nearest postoffice would best answer that purpose. This was the general rule, which was afterwards so modified that a notice was held good if sent to an office to which the party usually applied for his letters, although it was in a different town from that in which he resided. And after all, the question settles down to the inquiry, not whether the notice was directed to the nearest postoffice to the defendant, but to that which was most likely to impart to him the earliest intelligence. Under the circumstances of this case I think it was, and that the verdict is right.

The rest of the Court concurring,

PER CURIAM. No error.

ERWIN AND OTHERS v. KILPATRICK AND OTHERS.

The increase of slaves, born during the life of a legatee for life, belong to the ulterior legatee, who is the absolute owner.

PETITION filed in the court below against the defendants as executors of the last will of William Erwin, deceased, and heard by *Nash, J.*, at ROWAN.

The petition stated that the petitioners were the daughters of the testator, who, having made a last will and testament, died, and that the defendants proved the will and assumed the execution thereof. That among other bequests, the will contained the following: (457)

"If my wife cease to be my widow, by marriage, it is my will that she shall have her bed, and her choice of one horse, and a fifth part of the household and kitchen furniture, but to have no further claim to the use of my negroes. In this case, or at her death, it is my will that my son Joseph shall have my negro named Isaac, and my son John shall have Jack and Lyd, his wife, requiring of him some care of and attention to such of his sisters as may remain unmarried."

The petition further stated that after the death of the testator, and during the life of his widow, the slave Lyd had issue two children, Alfred and Verdy, after which the widow died; that the testator's son Joseph was dead without issue, and that John Erwin claims the negroes. The petition then insists that the negroes Alfred and Verdy were undisposed of by the will, and prays that the defendants may be compelled to make distribution among the petitioners and John Erwin, the surviving children of the testator.

The answer admits all the facts set forth in the petition, and submits to the Court whether the petitioners have title. The defendants in their answer then allege that they put the negro slaves into the possession of the widow according to the will, and she retained the possession, and they insist that by thus leaving the property with the person entitled to the life estate they have discharged their duty as executors, and are not liable to be called upon by the petitioners in the character of trustees.

John Erwin, the son, being also made a defendant, answered, claiming the negroes Alfred and Verdy (the children of Lyd born during the life estate of his mother), because he was by the will entitled to the mother Lyd after the death of the widow.

The cause coming on to be heard upon petition and answers in the court below before *Nash, J.*, he ordered the petition to be dismissed; and the petitioners appealed to this Court.

(458)

J. Martin for the petitioners.

Taylor, C. J. Ever since *Tims v. Potter,* 1 N. C., 12, the question arising in this case has been considered at rest; and it would be attended with the most mischievous consequences again to draw it into controversy. It has now become a fixed rule of property that the increase of slaves, born during the life of the legatee for life, belong to the ulterior legatee, who is the absolute owner. The judgment must be

Per Curiam. Affirmed.

Cited: Jacocks v. Bozeman, 21 N. C., 194; *Covington v. McEntire,* 37 N. C., 318; *Patterson v. High,* 43 N. C., 55.

GOODLOE, ASSIGNEE, v. TAYLOR.

1. The payment of negotiable instruments should not be dependent on a contingency.
2. Where a note was drawn as follows, "against the 25th of December, 1819, or when the house John Mayfield has undertaken to build for me is completed, I promise to pay, etc," it was *held*, that the parties by "*inserting a specific date of payment*," had made it payable at all events, whether the house was completed or not, and that consequently the note was negotiable.

DEBT tried by *Nash, J.*, at GRANVILLE. The action was brought on a bond in the words and figures following, viz.:

Against the 25th of December, 1819, or when the house John Mayfield has undertaken to build for me is completed, I promise to pay to John Mayfield, or order, the just and full sum of \$818.23½, for value received, as witness my hand and seal this 21 February, 1818.

WARNER TAYLOR [L. S.]

Whereon was the following indorsement, viz.:

Pay the within to David S. Goodloe. (459)

JOHN MAYFIELD.

15 June, 1819.

The defendant offered to prove that the said Mayfield contracted with the defendant to build for him a large dwelling-house at the price of \$3,000 or thereabouts, which the defendant paid to him, excepting the sum mentioned in the said bond; that said Mayfield began the house, but did not finish it; and the work not done by him was of much greater value than the sum mentioned in the bond, and remains undone to this time, and that said Mayfield has abandoned the work, and the defendant further contended that the said bond was not negotiable, and that no action could be maintained by Goodloe thereon.

The court, *Nash, J.*, refused to hear the evidence offered, and instructed the jury that the said bond is negotiable, and that Goodloe, as assignee, might maintain the action.

Verdict and judgment for plaintiff, from which defendant appealed.

Ruffin for appellant.
Hillman and Hawks contra.

TAYLOR, C. J. The question arising on this record is whether the bond declared on is negotiable by force of the two acts of 1762 and 1786, the former making promissory notes assignable in like manner with bills of exchange, and the latter making bonds negotiable in the same way as promissory notes. With respect to bills of exchange, the law has been long considered settled that the payment of them should not be contingent, since it would greatly perplex commercial transactions if the persons to whom they were negotiated were obliged to inquire when the contingencies were likely to happen. The same rule is equally applicable to all negotiable instruments, and it may be assumed as a principle too clearly established by an unvarying series of authorities to need any reference to cases. The question, then, is whether this bond is, by its terms, payable at all events, or payable only on the contingency (460) of Mayfield's completing the defendant's house. If the latter be the case, the bond is clearly not negotiable, for the event may never happen, and a recovery could only be had by Mayfield upon his proving that he had performed the condition. But I am of opinion that this is not the true construction of the bond, since the parties by inserting a specific date of payment made it payable *then* at all events, whether the house would then be completed or not. If the work had been done before 25 December, 1819, Mayfield would then have acquired a right to the money, but in no event was he obliged to wait beyond that time. If an authority were required for so plain a case, there is one precisely in point in 7 Mass., 240, in which case the words of the note were: "This may certify that I do agree to pay to Solomon Stevens or order $40 by the 20th of May, or when he completes the building according to contract." The note was indorsed and sued for in the name of the assignee, and the objection taken was, in this case, that the note was payable on a contingency, and, therefore, not negotiable; but the Court held the note to be payable absolutely at a day certain. As, therefore, the bond was negotiable, and was actually indorsed before it became due, the evidence offered by the defendant to show a failure of the consideration was properly rejected. The judgment must be affirmed.

HALL, J. I entertain no doubt but that the note on which this action is brought is negotiable. Had it been payable on the contingency only of the building of the house, it would have been otherwise. But whether the house is built or not, it is payable at a particular time, and that time is ascertained from the face of the note, and for that reason it is (461) negotiable. See Chitty on Bills, 345, 376.

PER CURIAM. Affirmed.

Cited: Watson v. Bledsoe, 60 N. C., 252; *Bank v. Bynum,* 84 N. C., 28; *Bank v. Michael,* 96 N. C., 58; *Cotton Mills v. Dunston,* 121 N. C., 16.

CLARK v. SHIELDS.

Where a writ was issued in the name of A as plaintiff, and at the time of issuing it A endorsed thereon that the suit was brought to the use of B; *it was held* that A thereby made B his agent to receive and collect the amount of the debt sued for, and gave notice of such agency to the world, and that consequently A was bound by the act of his agent within the authority given him; that the authority here was to receive to his own use, and not as a mere collector, and therefore that B might receive anything which he thought proper in discharge of the debt.

DEBT on bond from HALIFAX. After the jury was impaneled below to try this cause, on motion of the plaintiff's counsel the name of Thomas Cox was expunged. Neither the writ nor declaration contained the name of Cox, but the record transmitted to this Court was indorsed, "Clark to the use of Cox v. Shields."

On the trial below the defendant offered evidence to prove that he and Cox, after the writ issued and before the return term thereof, entered into an agreement that the defendant should deliver to Cox staves at $30 per thousand, and that Cox should receive them at that price in part payment of the bond on which this suit was brought. This evidence was objected to, but received by the court, and the defendant then proved that under this agreement he had delivered to Cox some thousand staves. The court, among other things, instructed the jury that Clark, the legal plaintiff, by indorsing on his writ at the time he issued it that the action was brought to the use of Cox, thereby created the said Cox as his agent to collect and receive the amount of that debt, and gave notice of such agency to the world; that consequently Clark was bound by the (462) act of his said agent within the authority given him; and as the authority was to receive to his own use, and not merely to collect as an ordinary collector, the agent might receive anything in discharge of the debt he thought proper.

The jury found a verdict for the plaintiff, after deducting all payments, of $366.69; and from the judgment rendered plaintiff appealed to this Court.

The cause originally commenced in the county court, and there, as appeared from the record sent up, defendant *confessed* judgment for $523.72, with $275.84 interest thereon.

A new trial was moved for by the plaintiff and refused, whereupon he appealed to this Court from the judgment rendered below.

HALL, J. Laying out of the case the facts contained in the judge's charge, it is difficult to perceive what the agency and equity of Cox were. It seems that his name was somewhere inserted in the record, but for what purpose does not appear. But from the facts set forth in the judge's charge, the agency conferred upon Cox and his equity under it are obvious. It is unnecessary to repeat them. I altogether approve of the charge of the judge upon them, for the reasons by him given, which I also think it unnecessary to repeat. I think the rule for a new trial should be discharged. And in this opinion the other judges concurred.

PER CURIAM. No error.

Cited: Briley v. Sugg, 21 N. C., 367.

(463)

GOVERNOR TO THE USE OF ARMSTRONG v. BAILEY, ADMINISTRATOR OF JUDGE, AND PERKINS AND NEVILLE.

1. When a justice of the peace enters a judgment on the back of a warrant, and writes, "execute and sell according to law," these latter words must be deemed an execution; for the proceedings of magistrates are entitled to a liberal construction in mere matters of form.
2. When a constable, having such an execution in his hands, receives the money of the defendant therein, it is an *official act*, and not paying it over to the plaintiff is a breach within the penalty of his bond.

DEBT, tried before *Norwood, J.*, at HALIFAX, on the official bond executed by Judge and his securities upon his appointment to be a constable of Halifax County. The action was originally brought in the county court, and the breach of the condition was in not paying over to the real plaintiff, Armstrong, a sum of money alleged to have been collected by Judge as constable for his use. The defendants pleaded "*Non est factum,* conditions performed and not broken," and Bailey, the administrator, pleaded separately, "Fully administered, and that the personal estate had been sold according to the act of Assembly, and the money had not then been collected"; and on these pleas issue was joined. On the trial of the issues in the county court the jury found the obligation declared upon to be the act and deed of the parties, and found the breach of the condition as assigned by the real plaintiff, and assessed his damages at 22*l.* 5*s.* 6*d.*; and they further found that the administrator of Judge had fully administered. Judgment was rendered according to the verdict, and the plaintiff appealed to the Superior Court.

The cause was tried in the Superior Court at the last Spring Term, *Norwood, J.*, presiding, and a verdict was taken for the plaintiff, subject to the opinion of the court upon the following case:

James Judge, the intestate, was appointed a constable on the third

Monday of February, 1814, and the bond declared on was executed by said Judge and the defendants Perkins and Neville, conditioned for the due discharge of his official duties. (464) On 10 January, 1815, Judge received of Armstrong a note payable to one Edmund Jones, and executed by one William Woodard, for 17*l.* 6*s.* 11*d.* of the currency of Virginia, bearing date 14 January, 1813, the interest on which note was vested in said Armstrong. Judge sued out a warrant dated 10 January, 1815, upon the note, in the name of Jones, the payee, against Woodard; and on the warrant appeared the following entries indorsed: "Executed by James Judge." "17 January, 1815. Judgment against the defendant for $57.85, with interest from 14 January, 1813, and costs. Henry H. Jones, J. P." "17 January, 1815. Execute and sell agreeable to law. H. H. Long." "Received by James Judge, receipt dated 18 February, 1815, $24." "1815, September 9, this execution returned and renewed according to law. A. Read, J. P." Judge executed a receipt on 18 February, 1815, for the $24 in part of the judgment. The presiding judge was of the opinion that the plaintiff was not entitled to judgment upon the facts stated, because it did not appear that Judge had received the money in his official capacity, and a judgment was entered up for the defendant, whereupon the plaintiff appealed to this Court.

TAYLOR, C. J. The question made on the trial below appears from the record to have been whether the indorsement on the paper containing the warrant and judgment ought to be considered as an execution; for if it be so considered, the receipt of the money by Judge, being of posterior date, was made in his official character, and comes within the penalty of the bond. The same question arose in *Forsyth v. Sykes,* 9 N. C., 54, where the execution issued by the magistrate was almost literally the same as this; and it was sustained by the court upon the principle (465) that the proceedings of magistrates were entitled to a liberal construction when the exceptions related merely to regularity and form. In that case *Lanier v. Stone,* 8 N. C., 329, was referred to, where the Court had determined that an irregular execution may be cured and corrected by the return of the constable. There is nothing in this case, as we read the record, that should induce us to depart from former decisions.

PER CURIAM. Reversed.

Cited: *McLean v. Paul,* 27 N. C., 24; *Patton v. Marr,* 44 N. C., 378.

FIELDS v. MALLETT.

1. A sealed note is not entitled to days of grace as between indorsee and indorser.
2. When the maker of such a note was a physician, having a shop and a dwelling house in different parts of the town; and when the note became due the indorser informed the holder that the maker was fifty miles out of town, and would pay on his return; *it was held* that under such circumstances an application at the shop was all that the law required, and that an application at the dwelling house of the maker was unnecessary.

ASSUMPSIT, from CUMBERLAND, on a single bill against the defendant as indorser, and plaintiff declared, first, on a sealed bill which had been lost by accident; secondly, on a sealed bill for $257.50, indorsed by defendant; and, thirdly, on a sealed bill for $200.

The facts were these: Doctor Andrew Scott had made the bill in question, payable on 4 September, 1821, to the defendant, and the defendant had made a bill payable to Scott at the same time for the like sum, and Scott and the defendant respectively had indorsed these bills to the plaintiff. Scott had a family, and resided in the town of (466) Fayetteville and his shop was at some distance from his dwelling-house.

On 5 September, 1821, the plaintiff, by his agent applied to the defendant, who paid his own note, and was requested to pay Scott's, to which he replied that it was enough for him to pay his own, and that Scott would pay his when he returned from Chatham County, whither with his family he had gone on a visit. The agent had been at the shop of Scott to demand payment before he applied to the defendant; the shop was shut up, and no one there; the agent understood that Scott had a house in town, but he made no inquiries for it and no demand at it.

On 7 September, 1821, the bill was protested, and the protest stated a demand at Scott's shop, and notice by letter left at defendant's counting house. About a fortnight after, the bill was presented by the agent to Scott, and not paid, but no notice of this personal demand was ever given to defendant.

The bill was proven to have been given for $257.50, payable 4 September, 1821. The bill exhibited in evidence had been partly destroyed by having the left-hand lower corner burned off so as to destroy the words $57.50, which commenced a line of the writing. When the bill was presented to Scott in this burnt condition, he, without the knowledge or consent of the defendant, interlined the words which the fire had destroyed; the agent had no instructions to request Scott to do so, and in fact objected, but Scott did it, saying it could do no harm. The plaintiff, when the agent returned with the note thus interlined, said that the agent should not have permitted it to be done.

The plaintiff offered the bill thus mutilated and interlined, but having thereon the defendant's indorsement, in support of his second count.

It was proved that the plaintiff had papers, and among others Scott's note, then entire, looking over them before the fire; in about an hour afterwards the witness returned and the plaintiff had the (467) note in his hand burned as above described. The burning of the note by accident was left on this evidence as a matter of fact for the jury; and they were instructed that if they believed all the evidence of plaintiff, still he could not recover, as a demand at the shop, and that shut up, was not sufficient if the drawer had a house in town in which he resided; that the plaintiff should have at least have made inquiry whether the note would have been paid there before he gave notice to the defendant. The jury was further instructed that if Scott made the interlineation on the face of the paper without the consent or authority of the plaintiff it would not operate to discharge the indorser.

Verdict for defendant; new trial refused; judgment, and appeal.

Gaston for appellant.
Ruffin contra.

TAYLOR, C. J. It is the opinion of a majority of the Court that (469) the bond executed by Scott fell due on 4 September, and that a demand on the 5th, the plaintiff living out of town, was a sufficient exertion of diligence. That the information of the defendant to the agent that the maker was 50 miles out of town, and that he would pay the note on his return, rendered an application at the dwelling-house of the latter unnecessary; but that under the circumstances of the case an application at the shop was all that the law required, where, if any one had been left to pay the note, he was most probably to be found, though if such had been the case it would have been known to the defendant. For which reason a new trial is awarded.

PER CURIAM. New trial.

SMITH v. THE EXECUTOR OF AMIS.

When the ground on which a party rests his complaint is *mistake*, the forum to which he must apply is determined by the *nature of the relief* which he seeks; if equity only can relieve he must apply there; if a court of law can relieve he may seek its aid. Few are the cases of mistake in which a court of law can relieve, but the rules of evidence are the same, no matter to which tribunal he applies. The ground on which a court of law refuses sometimes to hear evidence to prove a mistake is, not that the evidence is improper to prove the fact, but that it is useless, because the court cannot relieve, however clearly the mistake may be proved. Where one sold a tract of land and executed a deed containing the usual acknowledgment of the purchase money, and afterwards discovered that a mistake had been made in counting the amount paid, whereby he was prejudiced, he was allowed, in a court of law, to show such mistake by parol evidence, and on the promise of the purchaser to correct mistakes, to recover the deficiency, notwithstanding the acknowledgment in his deed.

ASSUMPSIT, from NORTHAMPTON, on the common counts, and also that the plaintiff, on 3 January, 1823, sold to the defendant's testator a tract of land called Mush Island, for the sum of $38,000, payable in (470) bonds; that in estimating the amount of said bonds at the time of making payment a *mistake* in adding up the different sums was committed against the plaintiff, amounting to $3,071.88, of which due notice was given to the testator, and he promised and undertook to rectify the same.

The various dealings had taken place between the plaintiff and defendant's testator, and that in the settlement of the same an error against plaintiff was committed to the amount of $3,071.88, of which notice was given to the testator, and he promised to correct the same.

The plaintiff offered in evidence a paper purporting to be "a list of bonds paid by William Amis to Henry Smith for the Mush Island plantation." These bonds were added up on the list and amounted, according to such addition, to $38,000; and the paper contained these words:

I guarantee the above list of bonds to Mr. Henry Smith, provided he does not indulge longer than six months; and he is fully authorized to institute suits on them for his benefit. WILLIAM AMIS,
Test: SHIRLEY TISDALE. *By* JOHN D. AMIS.

Tisdale, who appeared to be the witness to the list of bonds, was introduced by the plaintiff, and stated that the list of bonds purchased was made by him; that the bonds actually passed from Amis to Smith; that he first made a rough calculation, and then copied the names and figures on the list produced. Some days afterwards Amis told the witness that Smith had made known to him there was a mistake, and had applied to him to rectify it; that he had not done so, and that he and Smith differed in the sums, and Amis requested the witness to find the rough sketch; the witness did so, and told Amis there was an error in the addition, to which Amis replied that he was always willing to rectify mistakes. The testimony of Tisdale to show any mistake was objected to.

Another witness on the part of the plaintiff, one Deberry, (471) proved that in a conversation between Amis and Smith, relative to the mistake, Amis said that everything on his part should be righted; Amis afterwards told the witness that he had been informed by Tisdale there was an error, and that he, Amis, would do on his part all that was right.

The defendant relied on his deed, executed by plaintiff, conveying to him Mush Island, and containing these words: "In consideration of $40,000 to him in hand paid by the said William Amis at and before the sealing and delivery of these presents, the receipt whereof the said Henry Smith doth hereby acknowledge," and contended that there was no consideration for a promise, express or implied; that the deed was a release, and extinguished plaintiff's claim.

The jury was instructed that a receipt and acknowledgment under seal of the purchase money for a tract of land was conclusive evidence against a claim for the price of the land; but in the present case, if the jury believed there was a mistake in the settlement between the plaintiff and defendant's testator in the transfer of the above notes, of which Amis had notice, and if there was also an express promise to pay, then, notwithstanding the receipt contained in the deed offered in evidence by the defendant, the plaintiff might recover; and it was left to the jury to say whether there was any mistake, and notice thereof to Amis, and whether there was an express promise.

There was a verdict for plaintiff, a new trial was moved for and refused, and from the judgment rendered defendant appealed.

Ruffin for appellant.
Gaston for plaintiff.

HALL, J. In this case the contract was that notes to a certain (472) amount should be delivered to the plaintiff at the time the deed was executed. No credit was given, and both parties believed that the contract was executed. When the plaintiff discovered that there had been a mistake made in the calculation of the notes, he made it known to the defendant's intestate; he agreed to rectify it; his failure to do so is the foundation of this action. It is objected that the plaintiff shall not be heard to prove a mistake in that respect, because the deed sets forth that the consideration had been received, and *Brocket v.*

Foscue, 8 N. C., 64, is relied upon. In that case a receipt in the deed for the consideration money was given, when it was known to the parties that the money was not paid. That is not this case. It was believed that notes to a certain amount were delivered. Suppose, according to *Hargrove v. Dusenbury,* 9 N. C., 326, bank notes had been given instead of notes on individuals, and some or all of them had been discovered to be counterfeit; I think a receipt given for them would not stand in the way of recovery. It would not be denied but that the note had been received in payment, and a receipt given, as both parties intended; but the goodness or badness of the notes would be the question. So it is when fraud or accident respecting the thing delivered appears to have happened: it may be examined; so may a mistake as to the quantum of the
(473) thing delivered, whether it happened through accident or design.
In all these cases there can be no mistake about the truth of the receipt; it is admitted, and the thing it expresses was intended to be done; but it is an accident or a fraud *dehors* the receipt that is examinable. In action for a deceit, a bill of sale given for property is no objection; the delivery is not disputed, as the bill of sale sets it forth. But the question relates to the quality of the thing delivered. In this case the question does not relate to the quality, but to the quantity, of the thing delivered. The transition from the one to the other is natural, and, I think, founded in reason. Let the rule be discharged.

HENDERSON, J. This may be taken either as a receipt or a release; and the fact of a mistake in the counting of the notes may be shown by parol evidence, either in a court of law or a court of equity; for such proof is let in, without impugning the rule that written evidence is better than parol; for it is not controverted that the written evidence speaks the truth. As all mortals must of necessity speak what is according to their knowledge, and that knowledge being limited, and liable to misconception, the mistake when discovered may be shown. And the nature of the relief determines the forum to which application shall be made. If equity only can afford relief, application must be made there; and if a court of law can afford relief application may be made there; but the rules of evidence are the same in each court . But if application should be made to a court of law, and the mistake when proven affords no ground of relief, the proofs are rejected; for why prove a fact upon which the court cannot act? Few are the mistakes which a court of law can grant relief on; for few mistakes require more than modification and apportionment. They do not require the entire destruction of the writing. It is not so with regard to fraud; that vitiates the whole writing. Hence the opinion that a mistake in writing can be relieved
(474) against in a court of equity only. But for a fraud in a writing,

courts of law and equity have concurrent jurisdiction. The mistake, if there was one, afforded a good consideration for the promise charged in the declaration; and the fact whether such promise was made was fairly left to a jury; and if there was, as the jury have found, such a mistake and such a promise as charged, I think it affords a proper ground for relief in a court of law. Let the rule for a new trial be discharged.

The rest of the Court concurring.

PER CURIAM. No error.

Cited: *Reid v. Reid,* 13 N. C., 249; *Rice v. Carter,* 33 N. C., 300.

STUDDARD v. LINVILLE.

1. Words, to be slanderous, must be spoken with an intent to slander and must be so understood by the hearers.
2. A defendant sued for slander in charging the plaintiff with perjury attempted to justify by proving that in a collateral matter plaintiff had sworn falsely. *Held,* that perjury may be committed in swearing falsely to a collateral matter with intent to prop the testimony on some other point; but such collateral matter must be *material to the point in dispute;* if it be to a point, the existence or nonexistence of which cannot affect the question in dispute, it does not tend to prevent the due administration of justice, and therefore is not perjury.

CASE from STOKES for words spoken, charging the plaintiff with having committed perjury in a deposition which he had made.

Studdard had given his deposition in a suit in equity between one Campbell and the defendant, in which Studdard swore to a conversation between himself and Linville as to the state of mind of Linville's father, and stated that Linville had told him that his father was not more capable of taking care of his property than a child of 8 years of age.

In reference to this deposition, Linville had said that if he had ever told Studdard so, he must have been out of his senses; that (475) he (Linville) would not have taken the oath for all Studdard was worth. On another occasion he said, speaking of Studdard, "that a man had sworn crooked; it was too weak, and wanted strengthening; he thought a mainspring made of ear leather was as good a thing as could be got"; and on another occasion he said, speaking of the deposition, that "he never had told Studdard, nor any other person, that he, S., had sworn he had; he rather thought if he had he would have sworn false; that he intended to get testimony to do away that of Studdard."

The court instructed the jury that words alleged to be slanderous must, if unexplained, be taken by them in their common and ordinary sense: how would those standing by and hearing them understand them? If they should believe that it was the intention of the defendant to charge the plaintiff with perjury, and the words he made use of were such as to convey such intention to the minds of the bystanders, that they would be slanderous, and entitle the plaintiff to a verdict. They were the exclusive judges of the intention of the defendant in speaking the words in the present case.

In the course of the trial defendant, in support of the plea of jurisdiction, proved that when Studdard, in giving his deposition, related his conversation as to old Linville's state of mind; the defendant asked him where they were when it took place, and how they were employed, to which Studdard replied, they were "on the south side of a spring running off the land which defendant had purchased of Schweinitz, with a pocket compass." Linville then asked Studdard whose compass they had obtained, Studdard replied, Darius Mastin's. Darius Mastin was acting as clerk to the magistrates who were taking the deposition, and instantly denied that he had loaned Studdard a compass. Studdard then said that he had obtained it from Matthias Mastin, the father of Darius. On trial both Matthias and Darius Mastin swore that they had not, (476) either of them, loaned Studdard the compass.

Upon this part of the case the jury was instructed that a witness under examination could be guilty of perjury as well in a matter that was *collateral* to the main issue as in the main issue itself; that if he swore falsely in a collateral matter with the intention thereby to confirm and strengthen his evidence upon the main point, it was perjury in him if done knowingly; that if the defendant had satisfied them that the plaintiff, in that part of his oath relative to the compass and the survey, had knowingly sworn falsely with such intention of thereby giving greater effect to his oath as to the main fact, that it would be a complete justification. If, on the contrary, they should be of opinion that though that part of the oath was false, yet, that the plaintiff in taking it was influenced by no such corrupt motive, it would not amount to a justification, but would go in mitigation of damages; and of this intention they were the judges.

A verdict was returned for the plaintiff, assessing his damages at $10. The defendant moved for a new trial because of misdirection in matter of law and a finding contrary to evidence. New trial refused, judgment, and appeal.

J. Martin for defendant.

HENDERSON, J. Three reasons are assigned upon the record (477) wherefore there should be a new trial. We can only notice the first and third, the second being for error in fact. The reason first assigned is that the judge in instructing the jury that if they believed it was the *intention* of the defendant to charge the plaintiff with perjury, etc.; that he ought to have instructed them that if they believed that the defendant *meant* to charge the plaintiff wtih perjury, then, etc. The difference is scarcely perceptible. In fact, I think there is none. But take it as the defendant would have us, viz., that the jury understood from it that slander consisted in the intent to utter slanderous words, although the words might not be understood by the bystanders (which is a very forced interpretation). This definition is abundantly corrected by the other parts of the charge, for throughout he refers the slander to the intent of the speaker and the understanding of the hearers. But upon the words themselves the defendant's construction is not warranted. There is no substantial difference between *intending* to charge and *meaning* to charge. The latter word is not more referable to the hearer than the former. They both refer to the speaker, and it was to his intent or meaning that the judge was then calling (478) the attention of the jury.

Upon the third reason, I think the plaintiff and not the defendant has ground of complaint. Upon this point the judge informed the jury that a witness could as well be guilty of perjury in a matter that was collateral to the main point as on the main point itself; that if he swore falsely in a collateral matter, with an intent to confirm and strengthen his evidence upon the main point, it was perjury if done knowingly; that if the defendant had satisfied them that the plaintiff, in that part of his oath relative to the compass and survey, had sworn falsely, knowingly, with such intention of thereby giving greater effect to his oath as to the main point, that it would be a complete justification; but if in taking such oath he was influenced by no such corrupt motive (to wit, that of giving greater credit to his false oath on the main point), it did not amount to perjury. The intent to prop the false oath on the main point, and not the materiality of the fact sworn to, is made the essence of the crime of perjury. Perjury is an offense against the due administration of justice. The false oath must be material to the point about which the oath is taken; if believed, it must prevent the due administration of justice; it must either be to the very fact in issue or to some fact relevant thereto—that is, to some fact from which the jury may lawfully infer the fact in issue. And this relevancy is matter of law; the inference is matter of fact. Whether the survey was made, and whose compass was used, was neither the fact in issue, nor relevant thereto; whether the witness gave his evidence with an extraordinarily grave and solemn countenance with intent to strengthen his evidence upon the point in issue, could just as well be assigned as a perjury (6 East), as his statement of facts was totally immaterial, and the facts might or might not exist, without at all affecting the question in dispute. The reasoning of *Judge Locke,* in delivering the opinion of the late Superior Court in *S. v. Strat,* 5 N. C., 124, contains principles similar to (479) those contained in the charge of the presiding judge. I think them dangerous and destructive of the landmarks of our law, and thereby rendering the judiciary arbitrary. Had the plaintiff asked for a new trial, he should have had it.

PER CURIAM. No error.

Cited: McBrayer v. Hill, 26 N. C., 139; *Pugh v. Neal,* 49 N. C., 369; *S. v. Gates,* 107 N. C., 833; *McCall v. Sustair,* 157 N. C., 182.

DEN ON THE DEMISE OF THE HEIRS OF MORDECAI AND OTHERS v. OLIVER.

The general rule of ejectment is that the defendant must be proved to be in actual possession, notwithstanding the consent rule; but if a defendant, in a conversation before suit brought, admits himself to be in possession, and enters himself a defendant with a view of trying the title, upon proof of such admission the action, so far as proof of defendant's possession is necessary, is maintainable.

EJECTMENT, tried at WAKE, before *Norwood, J.*

On the trial a grant was produced to one Abernathy, covering the lands in dispute, and a title regularly deduced under the grant to the lessors of the plaintiff. A witness was then called to prove that the defendant was in possession or claimed title to the lands. The testimony of the witness was that on a survey of the lands before any action brought, Mordecai and the defendant being both present, the defendant declared that if suit was to be brought he wished it done at once. Mordecai then said to him, "If you go upon the land and cut down a sapling or a bush, I will sue you immediately," to which defendant replied, there was no use for any such thing, for that he had been using the land for a length of time, and claimed it as his own. In a few weeks after this conversation the present action was brought. One of the lessors was 22 years old at the time the action was brought; the other lessors were more than 24. They derived title by descent from (480) Henry Lane, the grantee of Abernathy, who died in 1797. The lands were conveyed to Henry Lane by deed in 1787, soon after the grant, and he had lived upon the land to his death, and his heirs after him up to this time. There was no actual possession by him and his heirs of any of the land covered by the deeds of both parties.

The defendant claimed under a grant to one Dillard of more recent date than that under which the plaintiff claimed. The grant to Dillard lapped on the grant to Abernathy and covered the land in dispute. Dillard had claimed a part of the lands covered by his deed, and which is now in dispute, and remained in possession more than seven years. Dillard's possession had terminated by his sale of the premises about twenty-five years past, and had not been kept up by any other person. The defendant deduced regular title from Dillard, and showed by evidence that about fifteen years before the action brought, while the lessors of the plaintiff were infants, he had cut timber off the land, had had hogpens erected, and had been in the practice of feeding his stock at the pens upon the land up to the time of action brought; that in one instance, during the infancy of all the lessors of the plaintiff, while workmen were getting timbers for the jail, they erected temporary cabins for their shelter and comfort, in which they slept, but abandoned them as soon as all the timbers were finished, which was about one year.

The judge below instructed the jury, in substance, that the possession to ripen into title under the act of limitations must be an actual possession; and that the defendant's possession, as above stated, was not such an one as would be sufficient to give title under that statute. But that it was not necessary there should be an *actual* possession in this case to maintain ejectment; that if the defendant claimed to be in possession, or claimed the lands in controversy, and entered himself a defendant in the action with a view of maintaining such claim, *that* was (481) sufficient to enable the plaintiff to maintain the present action.

Under these instructions the jury returned a verdict for the plaintiff, and a motion was made for a new trial on the ground of misdirection, which, being denied, and judgment rendered for the plaintiff, the defendant appealed to this Court.

Ruffin for appellant.
Seawell contra. (482)

HALL, J. In *Albertson v. Reding,* 4 N. C., 28; *S. c.,* 6 N. C., 251, the Court decided that in the action for ejectment it was incumbent on the plaintiff to prove the defendant in actual possession of the lands sued for, because it was presumable that the defendant was not so well acquainted with the boundaries of the land set forth in the plaintiff's declaration as the plaintiff was with the defendant's actual possession.

I approve of that decision; but the present case is different from it. In this case the judge told the jury that if defendant claimed to be in possession, or claimed the lands in controversy, and entered himself a defendant with a view of maintaining such claim, that was sufficient to maintain the plaintiff's action; by which I understand the judge to say that if the defendant admitted himself to be in possession of the lands sued for (not by entering into the common rule) by proof made for that purpose, *quoad hoc,* the action was maintainable. Of this opinion was the rest of the Court.

PER CURIAM. No error.

Cited: *McDowell v. Love,* 30 N. C., 504; *Atwell v. McLure,* 49 N. C., 376.

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(483)

MOLTON v. J. AND P. MUMFORD, BY THEIR GUARDIAN, HARRISON.

An action of ejectment was brought against the ancestor, pending which he died, and his infant heirs were made parties by *scire facias* to their guardian, who, in their names, came forward and defended the suit for the infants, and for their benefit took possession of and received the rents and profits of the land during the pendency of the suit; after a recovery by plaintiff in the ejectment he brought an action for mesne profits against *the infants,* who had never had any possession except that of their guardian before mentioned; *Held,* that plaintiff might sustain the action against them.

TRESPASS for mesne profits, tried below before *Badger, J., at* JONES. At the trial a verdict was taken for the plaintiff, subject to the opinion of the court upon the following case reserved.

An action for ejectment was brought in the name of John Doe, as lessee of the present plaintiff, against Richard Roe, and the declaration was served on Mary Mumford (mother of the defendants J. and P. Mumford) as tenant in possession; at the return term, September, 1819, Mary Mumford appeared, entered into the common rule, was made a defendant, and pleaded "Not guilty"; in December following she died. At March Term, 1820, her death was suggested, and a *scire facias* ordered to make her heirs parties; at September term following the defendants in this action were made defendants in the ejectment by the following entry on the record, viz.: "James Mumford and Penelope Mumford, by James Harrison, their guardian, acknowledge service of *scire facias,* and become defendants to this cause." At the succeeding term the action of ejectment was tried, and plaintiff had a verdict and judgment, and a *hab. fac. poss.* issuing thereon, the lessor of the plaintiff was put into possession.

After the death of Mary Mumford, and pending the ejectment, James Harrison, the guardian of J. and P. Mumford, took possession of the premises as their guardian, and as such received profits to the amount of damages assessed by the jury. The defendants James (484) and Penelope were infants of very tender years, and did not possess or occupy the land, or receive any of its profits, unless the occupation and receipt of profits by Harrison as above stated be their occupation and receipt in law to charge them in this action.

Upon these facts it was contended for the defendants:

1. That the defendants James and Penelope were never properly made defendants to the ejectment, and that consequently the proceedings in that action were no evidence against them of plaintiff's title.

2. That the plaintiffs cannot recover against the defendants the profits received by their guardian as above stated, as they did not personally intermeddle with the land or receive the profits; that as this was an action for a *tort* the infants could not be made liable to it by the acts of another, and the trespasser should himself have been sued.

The court below was of opinion with the defendants on the second ground taken, and pursuant to an agreement stated in the case set aside the verdict and directed a nonsuit, whereupon the plaintiff appealed.

Gaston for appellant.
**Badger for appellee.*

TAYLOR, C. J. It is the duty of a guardian to possess himself (488) of all the lands of which his word is apparently seized; to receive the rents and profits, for which he is to account to his ward at full age; and generally to pursue all those means pointed out in the act of 1762 towards the execution of his trust. If a suit be brought against the guardian for the lands of which the ancestor of the ward died seized, it is incumbent on the guardian to make a defense; for if the land is lost by his negligence, it would be a breach of duty in him for which he would be responsible to his ward. Should his defense be unsuccessful, and damages awarded against the ward, it would be repugnant to every principle of justice that the guardian should be made personally liable; (489) for who under such a state of things would become either a general guardian or guardian *ad litem?* When the law imposes a duty or obligation on a man, it will protect him in the discharge of it so long as he acts within the bounds of his duty. The guardian was compelled by law to defend the ejectment; he was compelled by law to enter upon the lands after the death of Mary Mumford and receive the profits, not for his own use, but for the eventual benefit of his wards, if they had succeeded in the suit. Not one tortious act has been committed by the guardian, for it would be a contradiction in terms to call that so which was done in indispensable obedience to the act of 1799, that if the heirs are minors after the death of their ancestor against whom an ejectment had been instituted, the guardian must defend the suit. The *tort* supposed in the action of ejectment is the original trespass or dispossession; *that* was committed by the ancestor in his lifetime, and the interference of the guardian was a rightful act because exacted from him by law, and because, to all human appearance, it might result in benefit to the heirs. The simple statement satisfies me that the guardian is not liable, and goes very far to prove that the heirs are liable; as the law provides that the only way in which a suit against an infant can be defended is by guardian; a recovery in such suit is a recovery against the infant, and must be binding upon him; for if a suit had been brought by a guardian or next friend, the recovery would have inured to the benefit of the infant. By intendment of law the suit and recovery are against the infant, as appears by the form of pleading: "And the said C. D., and G. H., admitted by the said court here as guardian of the said C. D. to defend for the said C. D., who is an infant under the age of 21 years, comes and defends the wrong and injury, when, etc." 2 Chitty, 409. The infants then did really receive the rents and profits by the hands of their (490) guardian, who would have been accountable to them had a contrary judgment been rendered. The guardian is the main instrument through which the infant's interests are managed; he must be bound by the guardian's acts generally, but emphatically by those acts which are done in obedience to the law. It would be singular that a judgment recovered against an infant by his guardian *in lite* should not bind him when the guardian may, of his own accord, do so many acts that will; he may submit the infant's rights to arbitration, and the infant would be bound by the award. *Roberts v. Naibold,* Comb., 318. Upon the whole I am quite satisfied that there ought to be a new trial and the nonsuit set aside.

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*NOTE.—The HON. GEORGE E. BADGER at the close of the spring circuit resigned his seat on the bench of the Superior Courts and resumed practice at the bar. This explains the reason of his having tried the cause below and having afterwards argued it in the Supreme Court.

The rest of the Court concurring, the nonsuit was set aside, and the judgment

PER CURIAM. Reversed.

MOLTON v. MILLER, ADMINISTRATOR OF MUMFORD.

1. An action of trespass for mesne profits may be brought against an administrator to recover profits received by the intestate in his lifetime.
2. The intestate died during the pendency of the ejectment and his heirs were made parties defendant: *Held*, that the record of the recovery against the *heirs* was evidence of plaintiff's right to recover against the *administrator*.

TRESPASS, brought to recover of the defendant the profits of a tract of land received by Mary Mumford, the defendant's intestate, in her lifetime, and was tried below before *Badger, J.*, at JONES.

On trial the plaintiff produced in evidence the record of a former action for ejectment, brought in this Court in the name of John Doe on the demise of the present plaintiff, against Richard Roe as the casual ejector. By this record it appeared that the declaration (491) was served on Mary Mumford, with the usual notice to her in the name of the casual ejector. At September Term, 1819, on the return of the declaration, Mary Mumford appeared, and being made defendant under the common law, pleaded "Not guilty"; in December following *she died.* At March Term, 1820, her death was suggested and *scire facias* ordered to make her heirs parties. At September Term following James Mumford and Penelope Mumford, her children, were made defendants by the following entry on the record: "James Mumford and Penelope Mumford, by their guardian James Harrison, acknowledge service of *scire facias,* and become defendants to this cause." At the succeeding term a trial was had, when there was a verdict and judgment for the plaintiff, and a writ of possession issuing thereon was returned "Executed."

The proceedings in this ejectment being the only evidence offered to show the plaintiff's right to recover against the defendant, it was objected by the defendant's counsel that the record of these proceedings was no evidence of the plaintiff's right against him, as the matters in controversy in that suit were not decided between the plaintiff and the defendant's intestate, but after her death between her heirs and the plaintiff, so that the proceedings in that suit was *res inter alios acta* as to the defendant, the administrator, he not being a party thereto, nor any one whom he represented, or to whom he was privy.

Of this opinion was the presiding judge; but he permitted the trial to proceed, reserving this question, and a verdict having been found for the plaintiff, it was agreed that it should be set aside and a nonsuit entered, if, on the matter above stated, the law should be against the plaintiff. The presiding judge retaining the opinion expressed on the trial, accordingly directed a nonsuit to be entered. from which the plaintiff prayed an appeal to this Court.

Gaston for appellant.
Badger for appellee.

(495) TAYLOR, C. J. Two questions have been argued in this case neither of which has been directly brought under discussion before. The first is whether the act allowing the *revival* only of tortious actions shall be construed to allow the original institution of them against the representatives. The position has hitherto been taken for granted that whatever suit could be revived might also be instituted; and after an attentive consideration of the several acts, and the arguments offered by the counsel, this is, in my opinion, the proper construction of the law.

According to the rules of the common law as it existed in this State, unaltered by statute, prior to 1786, personal antions pending in court abated by the death of either party; and equally so, whether they were founded upon *tort* or contract. In the former the right of action, under the exceptions created by the statute of Edw. III., died with the person, and could not be revived, either by or against the executors or other representatives; but in actions founded on contract the action only, and not the right of action, abated, and a new suit might consequently be brought by or against the representative.

By Laws 1786, ch. 253, the representatives were allowed to carry on every suit or action in courts after the death of either plaintiff or defendant; and from the comprehensive terms of this law it might be inferred that all actions, whether founded on *tort* or contract, were meant to be revivable, since, if it had been intended to restrict the privilege to such actions only as might have been brought by or against representatives at common law, a limitation to that effect would (496) probably have been introduced, especially as the statute of 8 and 9 Will. III., which prevents the abatement from the death of the party, after interlocutory judgment, is confined expressly to such actions as might originally be maintained by or against executors. A statute which must have been familiar to the members of the Legislature.

But a different construction was given to the act of 1786 by the courts, wherein it was held that it extended only to cases where, before the act, the executor might sue or be sued after the abatement of the former action.

This construction was acquiesced in until the year 1799, when various actions *ex delicto* enumerated in that act (ch. 532) are declared not to abate, and are allowed to be revived.

It was by force of the maxim, "A personal action dies with the person," that the death of either party abated the suit at common law; and it resulted from the operation of the same maxim that the right of action was lost in tortious actions before any suit brought. The term "action" is, then, manifestly susceptible of two significations, viz., an action pending in court and a right of action in tortious cases where no suit is brought; and either sense of the term must be adopted acccording to the subject-matter to which it is applied. It seems to have been received in this light by the Legislature in the two acts on this subject. "No action of detinue, etc., shall in any *cause* or court abate or be discontinued." (ch. 532, sec. 5). The word action when referred to court is used in its literal sense; but what construction can be given to action in a cause unless it be right of action? The meaning of the act, then, is that no action of detinue, etc., in any court, or right of action in any cause, shall abate. I have thus resorted to the peculiar phraseology of the act to show the meaning of the Legislature, though it is probable that general principles would have led to the same conclusion; for when one doth release to another all actions, not only actions pending in court, but also causes of action, are released. *Altham's case,* 8 Co. (497)

It might be thought that the argument drawn from the words of the act loses its force by the consideration that the terms "cause or court" are employed in the act of 1786, ch. 233, in the second clause, which aims to provide against the abatement of appeals by death; in which act the word "cause" furnishes a remedy against the death of either party in the interval between the judgment in the county court and docketing the appeal in the Superior Court. But this is obviated by the fact that the act of 1786 uses the term to provide for causes not actually depending in any court; and as the peculiar case therein specified cannot need any further provision, the same word was probably used in the act of 1799 to guard against the abatement of all causes or causes of action not yet brought into court, and which are enumerated in section 5 of the last mentioned act.

But in addition to these considerations, it may be remarked that the Legislature probably employed the words, "the same shall and may be revived," to signify instituting an orignial suit, because they are used in the same sense by a writer distinguished, among other qualifications, for the critical precision of his style. In discussing the subject of abatement of suits by death the commentator observes that actions *ex delicto* never shall be revived either by or against the executors or other representatives. But in actions arising *ex contractu,* where the right descends to the representatives of the plaintiff, though the suit shall abate by the death of the parties, yet they may be revived against or by the executors. 3 Bl., 312. Now we know that, according to the law this writer was expounding, the death of either party before a verdict put the cause out of court, and that the practice of continuing it by *scire facias* was and yet is altogether unknown. By reviving a suit, therefore, he meant bringing an action by or against the executor or other representative.

Every reason of policy, justice, and convenience which dictates (498) the propriety of continuing a pending suit seems to my mind equally strong in favor of instituting an original suit. And so generally has this construction been assumed as the true one that many actions have been brought and recoveries had since 1799 in which, whatever other important questions may have been agitated, a doubt on this, as far as I am informed, has never been expressed. In one case an action was brought and a recovery had against executors for a deceit committed by their testator in the sale of a chattel; and it was referred to the Supreme Court to decide what judgment should be entered. This question was then open on the record: Had the court considered only whether the action was one of those contemplated by the act of 1799? not doubting that a suit which might be revived could also be instituted. *Arnold v. Clement,* 4 N. C., 143.

The other question relative to the admissibility of the judgment against the heirs, as evidence against the administrator, is more difficult of solution. But after examining it in the various aspects in which it has been presented by the argument, endeavoring to ascertain the intention of the Legislature, and consulting, in the absence of all precedent, the best information to be derived from general reasoning, the conclusion arrived at is that the evidence should have been received.

The words of the act of 1799 are that "the suit shall stand revived, and shall be proceeded on in the same manner as if the defendant or defendants were living." If the defendant was living, and a recovery had against him, a right to the mesne profits would follow as a necessary consequence. And in an action brought to recover them the defendant would be concluded by the judgment in ejectment, and could not controvert the plaintiff's title. To allow the title to be controverted by the administrator, who is sued only because he is the depository of the fund out of which the damages are recoverable would clearly (499) contravene the spirit of the act by depriving the plaintiff of part of the benefit which the right of revival aimed to secure to him.

The heirs are made by the act the proper parties to defend the suit, because they should be heard on a question touching their inheritance;

but as they cannot be made liable directly for the tortious act of the ancestor, this action will not lie against them; yet as the right to these profits is incidental to the recovery of the land, the administrator must be bound by that recovery; otherwise the suit is not proceeded on in the same manner as if the defendant were living.

The question as to the title of the land was litigated by the only persons interested in its decision, and who, it may be presumed, would, on that account, make a *bona fide* and real defense. In that question the administrator had no interest.

Although on the death of a person his real and personal estate pass into different channels, yet the whole is made, by our law, a common fund for the payment of debts, the personal being primarily consigned to that end. But when the debts are paid the residue belongs to the heir and next of kin, and as the administrator holds in trust ultimately for them, the law thus raises a privity between the heirs and next of kin and the administrator. The common-law rule of evidence which makes a judgment against one person inadmissible in an action against another proceeds on the principle that the latter had no opportunity of calling witnesses, or cross-examining those on the other side, nor of appealing against the judgment. But in this case the heirs, as defendants in the ejectment, had this opportunity, and they are the persons who will be most materially affected by the diminution of the fund in the hands of the administrator. When the latter is called upon to pay these damages, he sees that the heirs, the persons to whom he is finally accountable, were called in to contest the principal question, as to the title; and there can consequently remain no solid (500) ground of defense on which he can resist the accessorial claim of mesne profits. In repeated conferences on this question the general result of the opinion of the Court is that the nonsuit ought to be set aside and judgment entered for the plaintiff.

PER CURIAM. Reversed.

BANK OF NEW BERN v. SNEED.

1. The acknowledgment which will take a case out of the operation of the statute of limitations must be an acknowledgment of a present, subsisting debt.
2. When a defendant, in an affidavit for a continuance, stated "that the action was founded on his guaranty, and by the absent witness he expected to prove such laches on the part of the plaintiff as to discharge him from his engagement," it was held that this was no acknowledgment to take the case out of the statute.

ASSUMPSIT, in which the plaintiff declared in two counts: the first, against the defendant as indorser of a promissory note; the second, upon the defendant's guaranty of a note alleging it as an agreement to be chargeable as an indorser.

Upon the trial at CRAVEN, before *Badger, J.*, it appeared that the defendant, being the holder of a note made by Hardee Mills, Thomas Mills, and William Mills, dated 20 September, 1816, and payable ninety days after date, to the president and directors of the Bank of New Bern, for the sum of $559, offered the note to the bank to be discounted for his accommodation; the note was accordingly discounted, and the proceeds applied to the defendant's use upon his writing an indorsement on the note in these words, "Guaranteed by John Sneed." The ninety days expired on 19 December, and (no payment having been made by (501) the makers) on the 23d notice of nonpayment was given to the defendant, and that the bank looked to him for payment. The defendant resided in the same street and within a short distance of the bank. The presiding judge, holding that the guaranty was an agreement to be responsible as an indorser, and that due notice had been given, a verdict was taken for the plaintiff, subject to the opinion of the court upon the further questions arising on the following facts:

The bank brought an action on the note against the makers to May sessions, 1813, of Pitt County court. The writ was returned, "Executed on Thomas and William Mills; Hardee Mills not to be found, having left the State." A *nol. pros.* was entered as to Hardee, and at August sessions following the bank obtained judgment against Thomas and William Mills. On this judgment a *fi. fa.* issued, which was returned at November, with these indorsements: "Levied on Thomas Mills' land where he lives." "Credit this execution with $60.97, paid by Charles Jenkins." "Indulgence by the plaintiff's agent for the balance." From November another *fi fa.* issued (not as an *alias*), returnable to February, 1819, which was returned indorsed, "Nothing to be found"; from February another issued to May, which was returned indorsed as the last; from May to August another issued, which was returned with the following indorsements: "Levied on the land where Thomas Mills now lives, as the property of said Mills, though in dispute, 24 May, 1819. No sale on account of the land being in dispute." From August a *ven. ex.* issued, which was returned to November, indorsed as follows: "The interest of Thomas Mills in the within land sold at the courthouse in Greenville, 5 November, 1819, and bought by Walter Hanrahan for $25"; a *fi. fa.* then issued, which was returned to February, 1820, "Nothing to be found."

The writ in this action against Sneed was returned to Spring (502) Term, 1820, when the defendant pleaded the general issue, with leave to add; at Fall Term, 1824, the plea of the statute of limitations was added, and at the same term the defendant made an affidavit for the continuance of the cause, because of the absence of Alexander Henderson, a witness, and stated in his affidavit as follows: "The action is founded on the guaranty of defendant, and by said witness defendant expects to prove laches on the part of the bank as to discharge him from his engagement."

Upon the foregoing statement the following questions were made:

1. Whether, by the proceedings of the plaintiff in Pitt against the makers of the note, the defendant was discharged.

2. The plaintiff's counsel contended that the statement of the defendant in his affidavit was such an acknowledgment of a debt as to take the case out of the statute of limitations; and it was agreed between the parties that if the court should be of opinion with the defendant on these points, then the verdict which had been taken should be set aside and a nonsuit entered; if with the plaintiff on both points, then judgment to be entered upon the verdict.

The presiding judge, holding that the affidavit contained nothing to be left to the jury as evidence of an acknowledgment of a subsisting debt, directed the verdict to be set aside and a nonsuit entered, whereupon plaintiff appealed.

Gaston for appellant.
Badger for appellee.

(517) HALL, J. I think the acknowledgment in the affidavit relied upon by the plaintiffs to take their claim out of the operation of the statute of limitations is not sufficient for that purpose. The defendant states in his affidavit that the action is founded on his guaranty, but he makes no acknowledgment of a present subsisting debt. The cases that come the nearest to this are *Bryan v. Horsemen*, 4 East, 599, and a case in 16 East, 419. In these cases the defendants acknowledged a present subsisting debt, but relied solely on the statute of limitations as a bar to the payment of it. Although in this case the defendant relies upon the laches of plaintiffs in giving time to the Mills, he does not state that that was his only ground of defense; he might have had others independent of that, and independent also of the statute of limitations. As, in addition to this, he makes no acknowledgment of a debt, I think judgment should be entered for him.

HENDERSON, J. I wish not to express an opinion upon what kind of an acknowledgment, accompanied with a refusal to pay, will take a case out of the statute of limitations; for, perhaps, I should do nothing more than add another decision to the many irreconcilable ones already made upon the subject. I will, therefore, confine myself strictly to the case upon the record. This acknowledgment, if it be one, is contained in an affidavit offered for the continuance of this cause. The affidavit, so far as it relates to the case, states that he, the defendant, is sued upon a guaranty of a note; that he expects to prove (518) by the absent witness laches or neglect on the part of the plaintiff which discharges him from his guaranty. By law, or rather by the rules of the court, he was bound to show the materiality of the absent witness, otherwise he could not obtain a continuance. The statement was, therefore, made with that intent, and that intent only; it was not intended as a full disclosure of his case, or cannot be so understood by the jury, that is, of itself. It does not import it. For aught that appears, he might have other grounds or reasons to show that the debt was not an unsatisfied one. It is entirely unlike the case where, in conversation, a bar or reason is interposed why a person should not pay a demand, if that bar or reason should be found false or insufficient, as in the case of a discharge under a commission of bankruptcy, or the like. There it may with probability be inferred that the consideration is unsatisfied, for the bar was interposed for that purpose, and that alone, and if false or unfounded it fails in its designed effect. And the mode of making acknowledgment admitted of as wide a range as the defendant chose. I say, therefore, in such case, the statement being made with a view to show that the debt was not due, and with no other view, it is not a forced construction to say that all the reasons, or at least the most prominent ones, were introduced; and if they are unfounded, the unsatisfied consideration still subsists, and upon which the law raises a promise, notwithstanding an express refusal is made to pay the debt. But I beg to be understood as expressing no opinion even in such case; that is, in pointing out any rule where the debt is revived and where it is not; for I can readily imagine cases where I think it should be. All that I mean to say is that this case is unlike them from the mode in which the acknowledgment is made. It is not (from this view of the case) necessary to say whether the action is founded on the old or new promise. The weight of authorities is much in favor of the old promise, and that the new (519) promise repels the bar of the statute; and although the principle may be the other way, as I rather think it is, the authorities are too old and too numerous to be gotten over. If one of two partners, after dissolution, promises to pay, the debt is revived as to the other, and in an action brought against him alone such promise may be relied on to repel the plea of the statute. This is conclusive, for he neither made the new promise nor was it made by one then authorized to bind or act for him. The action, if sustained, must be on the old promise.

I think, therefore, the cases which say if an executor sues on a promise made to the testator, and the statute of limitations is relied on, that he cannot give in evidence a promise or acknowledgment made to himself to take it out of the statute (for they say that is a departure), are wrong if the others are right. They should, therefore, be disregarded if the others are adhered to.

By the Court. Affirmed.

Cited: *Eure v. Eure,* 14 N. C., 214; *Falls v. Sherrill,* 19 N. C., 373.

TAR RIVER NAVIGATION COMPANY v. NEAL.

1. Where an act of the Legislature incorporating a navigation company authorizes, but does not require, the company to strike off the names of subscribers, delinquent by the nonpayment of the installments, and to sell their shares, this mode of proceeding is merely given as a cumulative remedy to facilitate the operations of the company, and does not preclude it from bringing suit for the installment due.
2. Whenever it appears that a charter has been granted to certain individuals to act as a corporation, who are in the actual possession and enjoyment of the corporate rights granted, they shall be considered as *rightfully* in such possession and enjoyment, against wrongdoers and all others who have treated or acted with them in their corporate character; and even if it be shown that the charter was granted on a precedent condition, and persons are found in the quiet possession and enjoyment of the corporate rights, as against all but the sovereign, the precedent condition shall be taken as performed.
3. Where by the charter commissioners are directed to ascertain the performance of a condition precedent to incorporation, and they declare it to have been performed, though such declaration be not true, yet shall it be deemed true until the sovereign complains; the usurpation, if there be one, is upon his rights, and his acquiescence is evidence that all things have been rightfully performed.

PROCEEDING commenced by warrant before a justice of the peace to recover from the defendant, as a corporator, the first installment declared by the president and directors of the company upon the shares standing in his name on the company books. By appeal the case was carried first to the county and then to the Superior Court, where it was tried at the last spring term before *Norwood, J.,* at FRANKLIN.

By the statement made up for this Court the case appeared to be this: By an act of the General Assembly passed on 1818 certain commissioners were appointed "for opening *books to receive subscriptions* to the amount of $75,000 for improving the navigation of Tar River."

The act directed that the commissioners, or a majority of them, (521) should prepare books for receiving the said subscriptions, and should open the same on or before 1 April, 1819, at such places and under the direction of such persons as they should designate for that purpose; the books to remain open until the first Monday in June, at which time they were to be returned to the commissioners in the town of Louisburg. The act then proceeded in these words:

"And on the first Monday of June next there shall be a meeting of the subscribers in the town of Louisburg, and *such meeting may be continued from day to day* until the business be finished. *If it appear to the said commissioners,* upon the return of the said books, that the sum of $30,000 has been subscribed, the said subscribers, their heirs and assigns, *from the time of their said first meeting,* shall be, and they are hereby declared to be, incorporated into a company by and under the name of 'Tar River Navigation Company,' and as such may sue and be sued, plead and be impleaded, defend and be defended, have perpetual succession and a common seal; and such of the said subscribers as shall be present at the said meeting, or a majority of them, are hereby empowered and required to elect a president and five directors for conducting the said undertaking and managing all the said company's business and concerns."

The second section of this act revives and declares in force the provisions of an act passed in 1816, entitled "An act concerning the navigation of Tar River." By section 4 of the act of 1816 it is enacted that certain sections of an act passed in 1812 for improving the navigation of Roanoke River, and among others section 4 of the said act, shall constitute part of the charter of the Tar River Navigation Company.

The section referred to in the act of 1812 provides that each subscriber shall pay, at the first general meeting of the stockholders, $10 upon every share by him subscribed, and on failure his name *may* be struck off the books and his shares taken by others complying with this provision. The section then authorizes the president and directors, from time to time, to make and sign orders for money, and to direct at what times and in what proportions the subscribers shall pay (522) the sums by them subscribed: *Provided,* that not more than $33.33⅓ per share shall be required to be paid in any one year. The section then enacts that "If any of the subscribers, their heirs or assigns, shall fail to pay their proportions required within one month after the same is advertised, the president and directors *may* sell at auction and convey to the purchasers the shares of the subscriber so failing, giving one month's notice of the sale." If such sale produce more than the sum due, with interest and charges of sale, the surplus is directed to be paid to the former owner of the shares sold; and if the sale should not produce the full sum due, with interest and charges, it is enacted that "the president and directors *may*, in the name of the company, sue for and recover the balance by motion in any court of competent jurisdiction, on ten days' previous notice."

In May, 1618 (before the passage of the act of 1818 above mentioned), a number of persons, and among them the present defendant, signed a paper-writing in these words:

"We, whose names are hereunto subscribed, promise and oblige ourselves, our heirs, etc., to pay to John D. Hawkins the sum of $100 for each share subscribed against our names severally, to the use of such persons as may be hereafter appointed president, directors, and company of the Tar River navigation, subject to such rules and payable by such installments as the charter for rendering navigable the said river may provide."

On this paper were subscribed shares to the amount of $32,000, and there was thereon an assignment by John D. Hawkins in the following words:

I hereby indorse and assign this subscription list over to the commissioners apointed by the Assembly of 1818 for the purpose of receiving shares of stock for making Tar River navigable.

1 March, 1819. JOHN D. HAWKINS.

On 1 April, 1819, the commissioners opened books for subscriptions pursuant to the act, and in one of the books so opened John D. Hawkins subscribed the names of those who had signed the paper made payable to him and the amount of shares subscribed by (523) each, and annexed thereto the following memorandum, viz.: "The foregoing were transferred from an old list made payable to John D. Hawkins for the use of the Tar River Navigation Company." And there appeared also subscribed in this book, in the handwriting of the parties themselves, shares to the amount $24,300, and among these subscribers was one of those who had signed the paper made payable to John D. Hawkins. To this subscription book was annexed the following certificate, viz.:

We, the undersigned commissioners under the act of 1818, concerning the Tar River Navigation Company, in pursuance of the authority vested in us, opened the foregoing subscription and met in the town of Louisburg the first Monday of June, 1819, and from day to day adjourned until the 16th June, when the said commissioners met. On making an estimate of the subscription made as aforesaid, and on other subscriptions the sum of $56,300 *appeared to have been subscribed on the* *said first Monday in June,* instant. Whereupon, according to the provisions of said act, the said company is declared to be incorporated accordingly.

W. MOORE,
JOHN D. HAWKINS,
JOHN J. INGE,
N. PATTERSON,
Commissioners.

On the trial of the cause in the Superior Court the defendant objected that there was no such corporation as the Tar River Navigation Company, and moved for a nonsuit.

The plaintiffs then offered to prove that at the meeting of subscribers which took place on the first Monday of June, 1819, which was adjourned from day to day until the 16th day of that month, the defendant, together with many others who had signed the paper-writing above mentioned, payable to John D. Hawkins, were personally present on the 16th, when the report of the commissioners above stated was read, and the question being put to the subscribers present whether they assented to the report, the defendant and all the other subscribers voted in the affirmative, and further, that the shares of the subscribers (524) then present amounted to more than $30,000, and that they at that time proceeded, pursuant to the act, to elect a president and directors, and that the defendant voted in said election. The presiding judge refused to admit this evidence. The plaintiffs then offered to prove that at the adjourned meeting on 16 June the shares of the subscribers who had signed the commissioners' books with their own hands, together with those who had signed Hawkins' paper, and who were represented by proxies then present, duly authorized, amounted to more than $30,000. This evidence also the judge rejected, and ordered a nonsuit to be entered; and thereupon the plaintiffs appealed to this Court.

Badger for appellants.
Gaston for appellee.

TAYLOR, C. J. The authorities concur in establishing the position that when a corporation sues for a debt its existence must be proved on the general issue; and the question arising here is whether the evidence offered was sufficient for that purpose. The act of incorpora- (535) tion, and the declaration of the commissioners that the necessary sum had been subscribed, and the subsequent proceedings of electing a president and directors, gave existence to the corporation; and although the commissioners should have been mistaken in their report as to the amount of the sum subscribed, yet having been entrusted by the Legislature with the power of deciding on that fact, their acts can only be examined in a proceeding directly against the corporation to inquire into the validity of the charter. It might be sufficient for the purposes of the case to set aside the nonsuit on account of the rejection of this evidence; but as other topics have been discussed, upon which it may be desirable to the parties to have the opinion of the Court, as the means of preventing expense and litigation, I shall now proceed to notice them.

It is said that no action or warrant can be brought for the payments declared by the company, because the law of 1812 has provided for striking off the names of the delinquent subscribers and the sale of their shares. But the terms of this act leave it discretionary with the company whether they will do it or not. It is merely a cumulative remedy given by the act to facilitate the operations of the company; for it might happen that the shares should become wholly unsalable and unproductive when the exigencies of the company demanded an immediate supply of funds, which yet might be raised by suing the stockholders on the original contract. A similar provision has been inserted in the charters of other incorporated companies; and the general course of judicial exposition is that it gave the company an election either to sue or exact the forfeiture prescribed by the statute.

The only other question I shall notice is whether it is competent for the defendant to deny the existence of the corporation; and considering the contract made by him, promising to pay for the shares to the use of the persons who might thereafter be appointed president, (536) directors, and company, his presence at the meeting when the commissioners made their report, his assent thereto, and afterwards voting for the president and directors: these are acts which, taken in connection with each other, do, in my opinion, estop him from disputing the regularity of inceptive steps tending to formation of the company. By entering into a contract with the plaintiffs in their corporate name, he thereby admits them to be duly constituted a body politic and corporate under such name; a rule which appears to be recognized in 2 Ld. Ray., 1532, and one certainly consistent with justice and the analogies of the law. I think there ought to be a new trial.

HALL, J. To the act of 1818, ch. 979, the Tar River Navigation Company owes its existence. That act gave it its incipient form, and enabled it, by a transfer to it of certain powers, to become a corporation. It declares, among other things, "that if it shall appear to the commissioners upon the return of the books that the sum of $30,000 has been subscribed, the said subscribers, their heirs and assigns, from the time of their first meeting, shall be, and they are hereby declared to be incorporated into a company, etc., and as such shall sue and be sued, and are empowered to elect a president and directors." The case further states that at a regular meeting of the commissioners they reported that $56,000 were subscribed. That such report was received by the stockholders (one of whom the defendant was), and by them approved; that they proceeded to elect, and did elect, a president and directors. The company being thus established in the manner pointed out by the act, the defendant ought not to be permitted to dispute its existence; and the less so as he in part, by his vote, had confirmed it. If the commissioners improperly exercised the powers conferred upon them by the act, they cannot be called to an account by the defendant in the present action; some other remedy must be resorted to. I, therefore, think (537) that the company is authorized to sue, and, as the judgment of nonsuit was pronounced under a different impression, that a new trial should be granted.

HENDERSON, J. I do not go the whole length of the plaintiff's counsel in saying that persons in possession of corporate rights or franchises shall be considered as rightfully corporators against all persons but the sovereign; but agree with them, with this qualification, that where it is shown that such corporation may by law exist, that is, where it is shown that a charter has been granted, those in possession, and actually in the exercise of those corporate rights, shall be considered as rightfully there, against wrongdoers, and all those who have treated or acted with them in their corporate character; and even where it is shown that such charter has been granted upon a precedent condition, and persons are found in the quiet possession and exercise of those corporate rights, as against all but the sovereign, the precedent condition shall be taken as performed. And much more will I consider the condition rightfully performed, where it is by the charter left to others to declare the fact of performance, and such persons make such declaration. The sovereign alone has the right to complain, for if it is an surpation it is upon the rights of the sovereign, and his acquiescence is evidence that all things have been rightfully performed. I think, therefore, that the presiding judge erred in holding the plaintiff to strict proof of the performance of the condition, and more so by not considering the declarations of the commissioners as evidence of that fact. Let the rule for a new trial be made absolute.

So, PER TOTAM CURIAM, Judgment reversed.

[Vide *Turner v. Baines*, 2 H. Bl., 559, in which it was held that church wardens *de facto* might maintain an action against former church wardens for money received by them for the use of the parish, *though the validity of the election of the plaintiffs to the office was doubtful*, and though they were not the immediate successors of the defendant. The Court held that, as against the defendant, it was sufficient that the plaintiffs had been "admitted, and sworn into the office, and acted as church wardens." As this seems to be a direct authority on one part of the foregoing case, and was not adverted to in the argument or the opinions of the judges, the Reporter takes the liberty of adding it to the case by way of note.]

Cited: Turnpike Co. v. McCarson, 18 N. C., 309; *Academy v. Lindsey,* 28 N. C., 479; *R. R. v. Saunders,* 48 N. C., 128; *R. R. v. Thompson,* 52 N. C., 389; *Trustees v. Chambers,* 56 N. C., 279; *R. R. v. Johnston,* 70 N. C., 350; *Bass v. Navigation Co.,* 111 N. C., 449; *Cotton Mills v. Burns,* 114 N. C., 355; *Boyd v. Reed,* 120 N. C., 339.

(538)

FOSCUE, EXECUTOR, ETC. v. FOSCUE.—From Carteret.

Where slaves were given by deed to A B and C D, to them, their heirs and assigns forever, "immediately after the death of" the grantor, reserving the use and profits of the slaves to the grantor during his natural life, and *after his death* to the said A B and C D, it was *held,* that as there could not be a limitation of a remainder in a personal chattel upon a precedent estate for life by deed, that the deed operated nothing, but left the property in the donor as it was before.

DETINUE to recover a negro slave Tom, and came on to be tried before *Badger, J.,* at CARTERET, when a verdict was given for the plaintiff, subject to the opinion of the court on a case stated and reserved; and if the opinion of the court be for the plaintiff, then judgment to be rendered for him; if for the defendant, then the verdict to be set aside and a nonsuit entered. The case reserved is as follows:

The negro slave belonged to Simon Foscue the elder, who died in possession of the said slave, having first made and published his last will and testament, of which he appointed the plaintiff executor. After testator's death the plaintiff proved the will and took the negro into his possession; afterwards, and before the bringing of this suit, the defendant obtained possession of the slave, claiming under a deed executed by the testator in his lifetime, and retained that possession up to the present time. The deed was in these words:

THIS INDENTURE, made this 20 April, 1809, between Simon (539) Foscue, Sr., of the county of Jones, North Carolina, of the one part, and Lewis Foscue and Sarah Foscue, son and daughter of said Simon, of the other part, witnesseth: That said Simon Foscue, for and in consideration of the natural love and affection which he has and beareth unto the said Lewis and Sarah Foscue, also for their better maintenance and preferment, have given, granted, conveyed, and confirmed unto the said Lewis and Sarah Foscue the lands and negroes hereinafter mentioned in manner and form following to wit: to Lewis Foscue two negroes, named Martin and Tom, also one-half of that tract of land whereon I now live on the upper part of said tract, reserving to my wife Betsy Foscue her dower right during her life or widowhood; to Sarah Foscue, four negroes, named Nero, Charles, Peter, and Lucy, which said lands and negroes above mentioned the said Simon Foscue, Sr., doth hereby give, grant, alien, enfeoff, convey, and confirm unto the said Lewis and Sarah Foscue, to them, their heirs and assigns forever, *immediately after the death of the said Simon Foscue, Sr.,* the said Simon reserving to himself the use and profits arising from the said land and negroes aforesaid for and during his natural life, *and after my death* unto the said Lewis and Sarah Foscue, to them, their heirs and assigns forever.

In witness whereof, etc. SIMON FOSCUE, SR. [L. S.]

By the will this negro was bequeathed to one Stephen Foscue, who, before the action brought, released to the plaintiff all his interest under the bequest. Upon these facts the court below was of opinion that, as by the *terms* of the deed nothing was to vest in the defendant until the death of the donor, and as by the policy of the law there could not be a life estate in a personal chattel in one and a remainder limited thereon to another, therefore the deed operated nothing, but left the property in the donor as it was before.

The defendant's counsel then moved to arrest the judgment for a variance between the writ or leading process and the declaration, the writ being to take the body of the defendant to answer *"Simon Foscue, executor of Simon Foscue, deceased,"* and the declaration upon the plaintiff's own possession, in the usual form. The motion was over-
(540) ruled and judgment rendered for the plaintiff, whereupon defendant appealed to this Court.

Gaston for appellant.
Badger for appellee.

(544) HALL, J. This case, I think, falls within the principle on which *Graham v. Graham,* 9 N. C., 322, was decided.

From the words of the deed, the title of the property in question was not to vest in the donee until after the death of the donor; a life estate is reserved to the father; after his death a limitation of it is made to the son. It is cause of regret that a disposition of property so just and simple in itself cannot be sustained.

The Legislature by an act passed in 1823, have made provision for such cases. But, unfortunately, this deed is not included in it, having been executed anterior thereto. The opinion of the Court is that judgment must be entered for the plaintiff.

PER CURIAM. Affirmed.

Cited: *Sutton v. Hollowell*, 13 N. C., 186; *Morrow v. Williams,* 14 N. C., 264; *West v. Ratledge,* 15 N. C., 39; *Hunt v. Davis,* 20 N. C., 37; *Newell v. Taylor,* 56 N. C., 376.

WILLIAMS v. HUNTER.—From Burke.

Case for unlawfully suing out an original attachment is to be considered in the same light with an action brought for suing out a writ where nothing is due; and to support the action plaintiff must show malice, and the want of probable cause in the defendant. No action lies for *irregularly* suing out an attachment, but for suing it out for the purpose of oppression and wrong.

CASE for unlawfully suing out an original attachment, before a justice of the peace, tried by *Paxton, J.,* at BURKE.

The evidence was that a few days before the plaintiff left the county he met with the defendant, to whom he was indebted, and told him that he was going to Montgomery County to endeavor to raise money to pay his debts; that he would return in July, and asked defendant what he would do with him; to which defendant replied that he would wait as long as any of the other creditors of plaintiff. The plaintiff left his family at their usual place of abode, and his brother, who lived with him, for the purpose of making a crop. Plaintiff spoke publicly of his design to go to Montgomery, and the purpose of his going, and left his home on the last Tuesday of March; he had appointed that day to meet and pay one of his creditors at Morganton, where the court was then sitting; he did not meet, and instead of pursuing the direct road to Montgomery, which led through Morganton, he turned off 2 miles above and went out of his way. Defendant came to court and heard of this circumstance, and was also informed by one Higgins that he, Higgins, had a conveyance for all plaintiff's lands, and that it was the opinion of some plaintiff would never return; defendant was also informed that the plaintiff had declared he would pay him last, if he did at all. There was diversity of opinion in the neighborhood whether plaintiff would return. Defendant's claim was due on 10 April, after

the plaintiff had gone, and on 11 April he sued out the writ of
(546) attachment, went to the plaintiff's house with the officer and
levied it on a mare which was claimed by plaintiff's brother, offering to wait provided his debt was secured.

Plaintiff returned in June. Defendant's counsel moved the court to instruct the jury that if they believed that the defendant sued out the attachment honestly, and that he had reasonable grounds to do so, plaintiff ought not to recover.

The court, *Paxton, J.*, charged the jury that the suit by attachment was a particular remedy pointed out by statute; defendant was bound to know what the statute required and to see that he acted within its provisions, otherwise he acted illegally and was liable to the plaintiff in this action. Verdict for plaintiff; new trial refused; judgment, and appeal.

TAYLOR, C. J. I cannot distinguish this case from an action for maliciously holding a party to bail, or suing out a writ when nothing is due, in which case the gist of the action is malice and the want of a probable cause; for, although the plaintiff in the first action should fail to recover, yet, unless it was brought with a view to oppress the defendant, and a knowledge that he had no sufficient cause of action, it will not give the original party a right to sue. The complaint here is that the plaintiff was not subject to the attachment law, not having recently removed; but there is no pretense that he was not justly indebted to the defendant, and if the latter had reason to apprehend the loss of his debt, and believed that the plaintiff had so removed as to subject his property to attachment, he cannot be made liable in this action. It was for the jury to consider, under all the circumstances of the case, whether the defendant's conduct was influenced by vexatious motives. The plaintiff, instead of meeting a creditor according to appointment,
went out of his way to pursue his journey, a circumstance which
(547) became known to the defendant soon after it occurred. He
learned, also, that he had conveyed all his lands to one of his creditors, and that he had determined to pay him last, if he paid him at all. When to this is added the difference of opinion that prevailed in the neighborhood relative to the probability of his return, it might have been thought by the jury that the circumstances were strong enough to overpower the presumption of fairness arising from the plaintiff's assertion as to his intention, and the apparent publicity of his removal. They were at least worthy of consideration, and whatever just inference arose from them should have determined this controversy. It is not for irregularly suing out an attachment that this action will lie, but for suing it out for the purpose of oppression and wrong. There should be a new trial.

HALL, J. I do not think that this case presents any facts which show that the attachment improperly issued. It appears that the plaintiff was indebted to the defendant; that he said it was the last debt he would discharge, as the defendant had been informed. He was also informed that he had conveyed away all his lands; that he had evaded seeing one of his creditors and paying the debt he owed him on the day he was to start to Montgomery, as he had promised to do; that it was doubted by the neighborhood whether he would return; besides it does not appear that he went to Montgomery and was there when the attachment issued. From all these circumstances I cannot see wherein the defendant transcended the limits prescribed by the act which authorizes attachment to issue. That act directs that attachment may issue when the party praying it makes oath that his debtor hath removed or is removing himself out of the county privately, or so absconds or conceals himself that the ordinary process of law cannot be served on such debtor. From the facts set forth the defendant might have believed that the plaintiff had absconded, or so concealed himself (548) that the ordinary process of law could not be served upon him; and if he believed it, he was not amenable in the present action, although the facts were otherwise than he believed them to be. It is not only necessary, for instance, in the present case that the plaintiff should have been residing in the county of Montgomery openly and not absconding from the process of law, but it is also necessary to prove that the defendant knew it. It must be taken that the party swore to the truth until it is proved that he knew the facts to be different from what he deposed to. I, therefore, think the rule for a new trial should be made absolute.

HENDERSON, J., concurring.

PER CURIAM. New trial.

Cited: Davis v. Gulley, 19 N. C., 363; *Burnett v. Nicholson*, 79 N. C., 550; *Ely v. Davis*, 111 N. C., 26; *Mahoney v. Tyler*, 136 N. C., 43; *R. R. v. Hardware Co.*, 138 N. C., 178; *Wright v. Harris*, 160 N. C., 555.

LINDSAY'S EXECUTORS v. ARMFIELD, SHERIFF.—From Guilford.

The law declares it to be a sheriff's duty to execute all process which comes to his hands with the utmost expedition, or as soon after it comes to his hands as the nature of the case will admit; where he takes no step from the 7th of October to the 1st of November, and assigns no reason for it, he is liable.

THE plaintiffs declared in two counts against the defendant as sheriff of Guilford: First, for a false return on a *fi. fa.* issued at the instance of the plaintiffs against one Brown; second, for negligence in his office by failing to levy the execution within reasonable time; and it appeared on the trial below that the plaintiffs' execution, *tested* third Monday in August, 1820, was issued 25 September, and was returned by the sheriff, who is the present defendant, indorsed "Came to hand 7 October, 1820; no property to be found," and signed by him. It further appeared that defendant or his deputy, while he had the plain- (549) tiffs' execution in his hands, went to Brown's house on the first Monday in November for the purpose of levying the same, where he found a barn of corn containing 50 or 60 barrels within Brown's inclosure.

The defendant then proved by one Carman, a constable, that on 31 October he had several executions in his hands at the instance of sundry plaintiffs, which on that day he levied on said corn and all the other property of Brown, but that he did not remove any part of the property, nor did he place it in the care of any person; that he advertised the property and sold it ten days afterwards. It appeared further that the executions spoken of by the constable were at the instance of different plaintiffs against the said Brown, the same being judgments regularly entered up and executions thereon regularly issued of date 30 October, 1819, on the same papers with the warrants; and on the face of two of said executions, dated in 1819, was written this memorandum: "This execution aliased and renewed 30 October, 1820. David Thomas, J. P."; and on the back of the others was indorsed "Aliased and revived 31 October, 1820. David Thomas, J. P.," and no other papers were in Carman's hands. It appeared further that David Thomas was a justice of the peace.

1. The judge below charged the jury that the executions under which the constable Carman made his levy were valid executions, and authorized him to make the levy.

2. That if Carman had levied his executions on the property of Brown before the sheriff or his deputy went to levy, that the sheriff had no right to levy the execution from court on said property. Though it bore *teste* prior to and was delivered to the sheriff before Carman had levied, yet it created no lien against the constable's levy.

3. That if a constable levy an execution and leave the prop- (550) erty where he found it, and in the hands of the defendant, and be guilty at the same time of no delay in the sale, no other officer had a right to levy on said property.

The counsel for the plaintiff then moved the court to instruct the jury that a sheriff is bound to use *reasonable diligence* to make the plaintiff's money on an execution; and that if he failed to use that diligence and the debt was lost, the sheriff was liable; and that it be submitted to the jury whether the sheriff had used *reasonable diligence* in neglecting to levy the plaintiff's execution on the property of Brown from the 7th to 31st October; and the court refused so to charge them, but told the jury "that by the tenor of the *fieri facias* the sheriff had until the return term of the same to make the money, unless hastened by the plaintiff; but if requested by the plaintiff the sheriff was bound to levy *immediately,* unless at that time employed in some prior official duties. But in this case it did not appear that the sheriff had been hastened by the plaintiffs to levy their execution, and it was submitted to the jury if the sheriff had used *due* diligence.

Under these instructions the jury found a verdict for defendant, and a motion for a new trial being overruled and judgment rendered against the plaintiffs, they appealed to this Court.

W. H. Haywood, Jr., for appellant.

HALL, J. The plaintiff's execution was a lien upon Brown's (553) property, and when on 7 October it came into the defendant's hands there were not until the last of that month any other conflicting executions. No reason is assigned why that execution was not levied upon Brown's property during that time. The law declares it to be the duty of the sheriff to execute all process which comes to his hands with the utmost expedition, or as soon after it comes into his hands as the nature of the case will admit. Bac. Abr., Sheriff, N. Dalt. Sh., 109. But it is further stated on belief of the defendant that although executions came into the hand of the constable Carman on the last of October, those executions were levied upon Brown's property, but that he did not remove any part of it, or place it in the care of any person; that he advertised and sold it ten days afterwards; that during that time, on 4 November, the defendant went to Brown's house where the property was on which the constable had levied, and that he failed at that time to levy upon it. In this I think he was again guilty of neglect, for I cannot hesitate in believing that the property was subject (554) to the plaintiff's execution, for it had the first lien upon it, which could not be divested by a mere levy of the constable; so that the defendant had between thirty and forty days from the time the execution first came to his hands to execute it. I give no opinion in a case where an execution issues to a sheriff and is a lien on property, and a constable under an execution of junior date seizes and sells the property before the sheriff had it in his power to levy upon and seize it. I think, in this case, the defendant made a false return, and that he was also guilty of neglect in not satisfying the plaintiff's execution out of Brown's property.

HENDERSON, J. In this case I wish not to express an opinion upon the priority or preferable right to satisfaction of the executions; but if a posterior execution could, by being levied by another officer, as by a constable or a United States marshal, gain a preference over one in the sheriff's hands, I think that the possibility of such preference being gained should quicken the exertions of the sheriff even beyond what the common law required; for by that law there was no such danger, there being but one person in the county (the sheriff) to execute process; and where there are two persons in one county exercising the office of sheriff, as in Middlesex, they both form but one officer; the act of the one is the act of both, and both must be sued. And the law guards the right of the plaintiff against voluntary alienations of the debtor. The sheriff should, therefore, proceed with all convenient speed to levy the execution in his possession. His omitting to do so from 7 October to 1 November, and more particularly on one so shortly thereafter returnable, to wit, on the third Monday of November, was a neglect which rendered him liable; and this would be neglect, I think, independent of the possibility of the property being taken by posterior executions, and if no such risk existed, (555) that is, that posterior executions could not gain the preference, then his return of *nulla bona* was false, for there was property in the defendant's possession and liable to the plaintiff's execution when the sheriff went to the house of the defendant. As to the plaintiff hastening the sheriff by a request to proceed immediately, he seeks not to recover for want of extraordinary exertions, but for the want of those exertions which the nature of his office required by barely having the execution put into his hands. If the plaintiff had sought to have recovered for any loss sustained by want of extraordinary exertions which the peculiar circumstances of the case might have required, then those circumstances should have been communicated to the sheriff with a request to proceed immediately in the execution of the process. So that, take it either way, that the constable's executions had gained the preference, or that they had not, I think the sheriff was guilty of neglect, and is therefore liable. This opinion is founded on the facts declared on the record. It is not intended to preclude the sheriff from showing facts or circumstances why he did not go sooner to the debtor's house, or any other fact amounting to a justification. I simply mean to say that, omitting 7 October to 1 November to make an attempt to levy an execution, returnable on the third Monday of November, *unaccounted for*, is in law neglect, and that the person who has sustained a damage thereby may recover. I, therefore, concur in the opinion of my brother HALL that a new trial should be granted.

The CHIEF JUSTICE concurring, also,

PER CURIAM. New trial.

Cited: Denson v. Sledge, 13 N. C., 140; *Kincaid v. Smyth*, 35 N. C., 497; *Morgan v. Horne*, 44 N. C., 26.

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(556)

JOHNSON, ADMINISTRATRIX OF JOHNSON, v. JOHNSON.

1. The consideration which is necessary to support a promise on which an action may be brought must yield a benefit to the party promising, or be attended with trouble or prejudice to the other party.
2. Where, therefore, one by advice *honestly given* induces another to purchase a tract of land, and the purchase being an unfortunate one, the party advising declares that, as he was the cause of the purchase, he will forgive the purchaser a debt due from him, such declaration or promise creates no moral or legal obligation.

ASSUMPSIT, brought upon the defendant's promissory note made payable to the intestate of the plaintiff in his lifetime, and was tried before *Norwood, J.*, at WARREN.

On trial the question was whether the defendant (who is a son of the intestate) had been discharged from the payment of the money due on the note. For the purpose of showing this, the defendant offered evidence that the intestate, just before his death, said (to a witness whom he called upon to take notice of his declaration) that the defendant should never pay any part of the amount of the note, for he was an industrious man and would take care of what he had. This evidence was objected to by the plaintiff's counsel, but received by the court. The defendant further gave in evidence that the intestate, in his lifetime, said that he had induced the defendant to purchase the tract of land, to pay for which the money secured by the note was loaned, by which purchase he had embarrassed himself; that he had received of the defendant some pork, flour, and beef; that the defendant had rendered him many valuable services; that he had brought the defendant's negro blacksmith to Warrenton against the wishes of defendant, where he died; and that, therefore, the defendant should not pay any part of the money. It appeared in evidence that the note was found among the intestate's papers after his death, with several credits for (557) interest and part of the principal indorsed.

The presiding judge instructed the jury that a mere declaration by the intestate that the defendant should not pay the money due on the note, unless accompanied with the destruction of the note, would not discharge the defendant; but if they found the facts to be that the intestate had induced the defendant to purchase the land mentioned and thereby involved him; that the intestate had received the money, flour, pork, and beef of the defendant, and the defendant had rendered to him valuable services, and that he had brought the defendant's blacksmith to town against his wishes, where he died; and that the intestate, *in consideration* thereof, declared that the defendant should not pay the said money, the defendant would thereby be discharged from the payment.

Under these instructions the jury found a verdict for the defendant. A motion was made for a new trial on the ground that improper evidence had been received, and also that the jury had been misdirected; and the motion being denied and judgment given for the defendant, the plaintiff appealed to this Court.

Haywood for plaintiff.
Badger contra.

TAYLOR, C. J. It is very evident that the testator's having said that the defendant should never pay any part of the note was not obligatory on him, unless it was founded on a consideration yielding a benefit to him, or attended with trouble or prejudice to the defendant. The motives inducing him to make this declaration are of different characters, and should have been discriminated to the jury according to their legal operation. The testator's having induced the defendant to purchase the land by which he became involved does not form a valid consideration; for understanding it as proceeding from advice honestly given, (558) although the event might have been unfortunate, he thereby incurred no moral obligation, and such a promise could not become legally obligatory on him. His having brought the defendant's blacksmith to Warrenton against the *wishes* of his master is subject to the same construction, for the testator must be understood, from the statement of the evidence, to have acted according to the best of his judgment for the defendant's interest, and as it does not appear that it was done against the consent of his owner, the accident of the negro's death could not make the testator liable either in law or conscience. The promise not to require payment of the note, so far as it was founded on these two considerations, was perfectly gratuitous and could only be enforced by applying to the feelings and bounty of the testator, but could in no view be made the subject of an action. But he further acknowledged that the defendant had rendered him many valuable services and had delivered him various articles of produce. These would form the proper subject of a set-off, could their amount be ascertained. May not the credit on the note have been in part for them? That these alone did not, in the testator's opinion, amount to a full payment of the note seems certain from his adding the other motives to them. The true inquiry for the jury to have made was whether the note had been paid off in the whole or in part, or whether the testator had promised that he would not require payment on such considerations as were valid in law. The fact was plainly a question of fact; and on the latter the jury should have been instructed that all the considerations were insufficient, except the produce delivered and the services performed.

In this opinion the other judges concurred.

PER CURIAM. New trial.

Cited: Hatchell v. Odom, 19 N. C., 308; *Little v. McCarter,* 89 N. C., 237.

(559)

MORGAN v. BRADLEY.

Where A. turned cattle into the woods, and B., thinking one of them his, took possession of it, after which A., ignorant of B.'s possession, sold it to C., who was also ignorant of it, it was *Held,* that C. might, in his own name, sue B., as the possession which he had at the time of the sale could not be deemed adverse.

TROVER for a steer. At the trial before *Paxton, J.,* at RUTHERFORD, there was contradictory testimony as to title. It appeared, however, that the plaintiff purchased the steer in December, 1821, of his brother Elijah, who had turned it out to graze in the fall preceding. It further appeared, also, that the defendant was in possession of the steer, claiming him as his own, and had been for some time before the sale. Demand and refusal to deliver up the steer were proved by the plaintiff, the defendant at the time contending that the property of the steer was in him. And upon these facts the defendant, by his counsel, moved for a nonsuit upon the ground that the plaintiff could not sue in his own name by reason of the adverse possession of defendant at the time of his purchase, which motion was overruled, and the jury having found a verdict for the plaintiff, the defendant obtained a rule for a new trial upon the same grounds, which being discharged, there was judgment against him, and he appealed to this Court.

HALL, J. The reason urged for a new trial in this case is that the court refused to nonsuit the plaintiff because, when he purchased the steer in dispute, he purchased a *chose* in action, and could not bring the action in his own name. The facts are that Elijah Morgan was the owner of the steer, and had turned him out with other cattle in the woods. In this situation (as he and the plaintiff supposed him to be) he sold him to the plaintiff, but it afterwards appeared that the (560) defendant, before the sale, had by mistake taken up the steer with his other cattle, supposing him to be one of his own raising. It is argued that this mistake divested the owner of his possession, so that he could only sell a *chose* in action. At the time of the sale there was no adverse possession by the defendant, as there afterwards was when the plaintiff made a demand for the steer. There was nothing of champerty or maintenance in the case; the seller and owner were both ignorant that the defendant had taken the steer into his inclosure. I think, from all the circumstances of the case, that the rule for a new trial should be discharged. *Nichols v. Bunting, ante,* 86.

PER CURIAM. No error.

Cited: Stedman v. Riddick, 11 N. C., 34.

SMITH, EXECUTOR OF SMITH, v. HARGRAVE.—From Davidson.

Where A. conveyed a slave to B., and on the same day B. by writing declared that he "put the said slave into the possession of A., and did give and grant the services of the said slave to A. during her natural life, free from any charge or claim for such services during her natural life," it was *Held*, that this did not operate to convey the *title* to the negro to A., but parted with the possession only, without compensation for his services.

DETINUE for negro slave Tom. The plaintiff claimed title to the said slave under a deed of gift made to his testator by Mary Buckhart on 11 May, 1816, duly proved and registered.

The defendant pleaded the general issue, and rested his defense upon a deed executed by plaintiff's testator to Mary Buckhart on the same day, 11 May, 1816, which deed is in the following words, viz.:

(561) I, Peter W. Smith, in consequence of a deed of gift made to me 11 May, 1816, by Mary Buckhart, for a negro boy slave named Tom, do hereby put the said negro boy named Tom into the possession of the said Mary Buckhart, and give and grant the services of the said negro boy named Tom to the said Mary Buckhart during her natural life, free from any charge, claim or demand for his services

during the term of the natural life of the said Mary Buckhart, her natural life. In witness whereof I have hereunto set my hand and seal this 11 May, 1816. PETER W. SMITH. [L. S.]

This deed was proved on 18 October, 1824, and thereupon registered. On the trial below it appeared in evidence that on 11 May, 1816, when the deeds were executed, Mary Buckhart made a formal delivery of the slave Tom to Peter W. Smith at the same time that she delivered the deed of gift, and that immediately thereafter Peter W. Smith delivered to her the slave Tom. Mary Buckhart has since died, and the defendant claimed under her will.

The jury found a verdict for the plaintiff, subject to the opinion of the court upon the question whether the deed made by Smith to Buckhart vested in her the absolute estate in the slave Tom. The court, holding that it did, gave judgment for the defendant, and the plaintiff appealed to this Court.

J. Martin for appellant.
Ruffin contra.

HALL, J. The operative words in the deed from the plaintiff's (562) intestate to Mary Buckhart are very different from those which are generally used in conveying title to property of this description. They are that he puts the said negro boy named Tom into the possession of the said Mary, and gives and grants the services of the said negro boy to the said Mary during her life, clear of any demand for his services during the time of the natural life of the said Mary. Nothing is said respecting the title of the said negro, and I (563) think the grantor intended to part with the possession only of said negro, and exempt Mary Buckhart from all accountability for the services of said negro during her life; and if it were allowable to look into the other facts set forth in this case this opinion would appear to me more strongly fortified, for it appears that Mary Buckhart, who was the owner of this slave, had conveyed her title to plaintiff's testator on the same day that the conveyance was made to her as before expressed. Now, it is not likely that she would have made that conveyance if she had intended that the same interests should be reconveyed to her on the same day. I think that judgment should be entered for the plaintiff.

The rest of the Court concurring in this opinion,
PER CURIAM. Reversed.

Cited: Smith v. Davis, 30 N. C., 510.

HELME v. RANSOM SANDERS, ADMINISTRATOR OF JOHN SANDERS, WHO WAS EXECUTOR OF ELLICK SANDERS.

It is the duty of an executor here to take out letters testamentary in another State for the purpose of suing for a debt due there, if the interest of the estate which he represents requires it; and in determining this latter point the magnitude of the debt, the distance and probable expense, are to be considered. An omission to do it, when necessary, amounts to a *devastavit.*

DEBT upon a judgment *quando,* suggesting a *devastavit* in John Sanders as the executor of Ellick Sanders, tried before *Daniel, J.,* at JOHNSTON. The suit was originally brought against John Sanders, and after his death the present defendant, his administrator, was brought in by *sci. fa.*

On the trial the plaintiff produced in evidence a judgment (564) *quando acciderint* in Johnston County court, May Term, 1817, in favor of the present plaintiff, against John Sanders as executor of Ellick Sanders for $127.31. To prove a *devastavit* he then offered the inventory returned by John Sanders as executor at November Term, 1815, wherein he made a list of several promissory notes due Ellick Sanders, as being in his hands, and among them the note of one Davis, due in 1811, on which there remained due 77*l.* 10*s.*, and at the bottom of the inventory were these words: "The above notes are considered desperate, and I will only be charged with them if collected."

Plaintiff then proved that Davis was solvent, and it also appeared that he resided in Columbia, South Carolina, and had there resided some time before the death of Ellick Sanders. It was also in evidence that John Sanders had twice sent the note to South Carolina and requested payment of it from Davis, who refused, assigning as a reason the want of money.

Defendant offered in evidence judgments *quando,* obtained by different plaintiffs against John Sanders as executor of Ellick Sanders, at August sessions, 1816, of Johnston County court, to the amount of $1,000 and upwards; none of which, however, had been paid, nor had any process been sued out on them by the plaintiffs therein.

For the plaintiff it was contended that the executor of Ellick Sanders had been guilty of *a devastavit* so as to charge him in this action by not suing for and recovering the amount of the note of Davis. On this point the court charged that an executor, qualified to a will in this State, is not bound, nor can he bring suit for money due his testator beyond its limits and jurisdiction, and further, that an executor named in a will, by proving the same here and taking out letters testamentary creates thereby no legal obligation on himself to take out letters

testamentary in another State, so as to recover by suit money (565)
due his testator in that State, though he may do so, and he may
receive the money without suit, and give a discharge of the debt, when it will become assets with which he is chargeable.

The plaintiff submitted to a nonsuit and, a new trial having been refused, appealed.

Haywood for plaintiff.
Devereaux contra.

HALL, J. I think an executor ought to use the same diligence in collecting the debts of his testator as he would use in collecting his own, provided he is a man commonly careful and diligent in the management of his own affairs, and this without regard to the consideration whether the debtor lives in one State or another. All the personal estate of the testator, wherever it is, belongs to the executor. 6 Co., 47. And he ought to use ordinary diligence to collect it. 2 Brown, 186, Bac. Ab., Executor, B. 2. Perhaps to collect a small debt in a distant State would cost more than the amount of the debt; but every case must depend upon its own circumstances. Procuring letters testamentary in another State is not of itself a decisive objection. As the jury were otherwise informed, I think there should be a new trial.

Another objection is made in this Court, and that is to the action being revived against the administrator of John Sanders. *Arnold v. Lanier,* 4 N. C., 143, decides this case. That was an action of deceit, brought against an executor for the deceit of the testator in selling an unsound slave. *Judge Seawell* delivered the opinion of the Court as follows: The act of 1799 declares that no action of detinue or trover, or action of trespass, where property, either personal or real, is in contest, and such action of trespass is not merely vindictive, shall abate by the death of either party. This is an action of trespass, though not *vi et armis,* and the passions and feelings have no concern; it is
in fact to recover for an act done by the defendant's testator, (566)
whereby he has been made richer and the present plaintiff poorer;
wherefore, we are all of opinion that the plaintiff is entitled to judgment. The same remark is applicable to the present case. I, therefore, think this objection not a good one.

HENDERSON, J. The law of the domicil of the owner governs the transfer and tranmission *ab intestato* of goods. A will, therefore, made according to the forms of that domicil passes such property wheresoever it may be situated; and if proven in the courts of that country, when offered in evidence in a foreign country, proof is not gone into of the execution of the will, but only of the probate. Such foreign probate, therefore, authorizes the executor to receive debts, take into his possession the property of his testator, and to do all acts appertaining to his office, except sustaining the character of an executor when he is the *reus actor* or plaintiff in a cause in court; this character he cannot sustain here, not for want of right, but for want of such documentary evidence of the right that the court can see upon an inspection (for the court does not, at that stage of the business, go into proof) that he is executor; he cannot, therefore, make profert of his letters testamentary, obtained in a foreign country, for want of authentic documentary evidence which our courts can recognize without proof. He must, therefore, obtain letters testamentary here. But this is not obtained by proving the will here *de novo,* for in that case it would be making *our* law, and not the law of the place where he had his domicil, the rule of decision. Our court of probate goes into evidence as to the fact of the foreign probate only, and, if satisfied of that fact, issues letters testamentary; that is, gives documentary evidence which our courts recognize as genuine. The taking out letters here is nothing more than obtaining the proof (567) necessary for the executor to sustain his real character in our courts, owing to our forms. If, therefore, the interests of the testator require it, the executor is bound to do it. It is a *devastavit* to omit it if thereby the estate sustains a loss. The magnitude of the debts to be sued for, the distance, the expense, are to be taken into consideration in ascertaining whether the interest of the estate requires it. But when the probate has been made in a sister State we think that the Constitution of the United States, and the law of the United States thereupon, gives to the probate, when authenticated according to the law of the United States, such an authentic form as that our courts will recognize the probate without proof, and that such probate may be proffered to the court to sustain the character of an executor. So that, take it either way, the executor has been guilty of a *devastavit* in not attempting to collect the debt due in South Carolina, and, therefore, there should be a new trial. In saying that goods are regulated in their transfer and transmission *ab intestato* by the *lex loci,* we do not include such property as owes its origin to the peculiar laws of any particular country, such as stock in bank and other corporate bodies. Such property is a creature of the law, and may be regulated by the will of the Legislature of that country which gives such property existence.

PER CURIAM. Reversed.

Cited: Governor v. Williams, 25 N. C., 154; *Hyman v. Gaskins,* 27 N. C., 271, 275; *Lancaster v. McBryde, ib.,* 423; *Williams v. Williams,* 79 N. C., 420; *Grant v. Reese,* 94 N. C., 730; *Moody v. Johnson,* 112 N. C., 802; *Hall v. R. R.,* 146 N. C., 346.

ANDERSON v. HAWKINS.

1. For many purposes bank notes are to be considered as *money;* they are so considered in an action for money had and received where the plaintiff had received a counterfeit bank note in exchange for genuine bank notes.
2. A payment in a counterfeit bank note is a nullity, and plaintiff may recover back the amount.
3. An indorsement on a bank bill of itself signifies nothing in the way of contract.

ACTION for money had and received, tried by *Norwood, J.*, at WARREN. The plaintiff alleged that he had exchanged $100 in notes of the banks of this State for a note of $100 of the Bank of Pennsylvania, and that the note so received by him was a counterfeit; and he gave evidence that he, by his agent, received the note of the defendant. The note had indorsed on it the name D. Matthews. The plaintiff's agent swore that at the time of the exchange defendant said that, being unacquainted with the notes of that bank, he had refused to receive it from Matthews without his indorsement; but on being asked by the agent if he, defendant, would also indorse it, he refused to do so. The agent also swore that he did not exchange for the note on account of the indorsement of Matthews thereon. The note was sent to the north, and soon returned as a counterfeit. Within a few weeks afterwards the agent had two conversations with the defendant, in which he informed him that the note was counterfeit and requested him to take it back; the note was proved not to be genuine. This was the plaintiff's case.

The defendant offered evidence to show that at the time of the exchange he told the agent that he must take the note on his own risk, for that he, defendant, did not know whether it was good or bad; and also proved that, some time after the plaintiff had demanded of him the amount of the note, D. Matthews had been applied to for payment of it by the plaintiff, and refused. (569)

The court instructed the jury that if a bank note was indorsed it was to be presumed that it was received both on the credit of the bank and of the indorsement; and added that it seemed to be admitted that Matthews had indorsed the note.

The jury found a verdict for the defendant, and the case stood before this Court on a rule to show cause why a new trial should not be granted.

Badger in support of the rule.
Seawell contra.

TAYLOR, C. J. This is an action for money had and received, in which the first question to be decided is whether the bank bills paid by the plaintiff are to be considered as money. It is certain that the spirit of modern decisions is to consider securities which are the current representation of money as money for all civil purposes; for in *Barclay v. Gooch,* 2 Esp., 571, where the person to whom the plaintiff had become surety for the defendant had consented to take the plaintiff's promissory note in payment as money, the taker was allowed to recover against his principal in an action for money paid. It was afterwards held that a bond and warrant of attorney given by the plaintiff could not be considered as money; but the Court do not deny the propriety of the decision in *Barclay v. Gooch,* but distinguish between a bond (not then negotiable) and other securities which are so. 3 East, 172. In *Longchamp v. Renney* it was held that an action for money had and received lay against a person who had received a masquerade ticket from the plaintiff, who had been instructed to sell it, and who had paid the owner for it under the threat of arrest; for as the defendant did not produce the ticket, it was a fair presumption that he had sold it. 1 Doug., 138. The case of *Israel v. Doyles* went to the length of deciding that the action for money had and received would lie on an accepted order which (570) the acceptor refused to pay. 1 H. Bl., 239. But this was probably extending the doctrine too far, and might not again be sanctioned. 5 East, 172. It seems, however, to be clearly settled, in respect to bank notes, that they shall be considered as cash in the ordinary dealings of men unless they show by their contract that they do not so treat them. On this subject the language of *Lord Mansfield* is peculiarly strong. He says that bank notes do not resemble and ought not to be compared to goods, securities, or documents for debt; that they are not esteemed as such, but are treated as *money,* as *cash* in the ordinary transactions of business by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes. They are as much money as guineas themselves are, or any other current coin that is used in common payments as money or cash; they pass by a will which bequeaths all the testator's money or cash, and are never considered as securities for money, but as money itself. On payment of them, whenever a receipt is required, the receipt is always given as for money, not as for securities or notes. *Miller v. Race,* 1 Burr., 455. In pursuance of the same principle, bank notes form a good consideration for an annuity, though the act requires a consideration of money; and that if a tender is made in bank notes, and no objection is made on that account, the courts have constantly considered such a tender as good. 3 Term, 554. In the recent case of *Pickard v. Bankes* an action for money had and received was held to lie against a stakeholder who had received country bank notes as money, and paid them over wrongfully to the original staker after he had lost the wager, the Court clearly deciding that if the defendant received them as money, and all parties agreed to treat them as such at the time, he shall not now turn round and say they were only paper and not money; as against him it is so much money received by him. 13 East, 20. From these cases I collect that the law is now settled that for the purpose of this (571) action bank notes are to be considered as money; and the policy of such a rule is infinitely more applicable in this State than in the country where it has been established; for it may be said that it forms here almost exclusively the only circulating medium.

In considering the other question, whether the case was properly submitted to the jury, it is not to be controverted, since *Hargrove v. Dusenbury,* 9 N. C., 326, that a payment in a counterfeit bank bill is a nullity, and that the person receiving it may recover the amount. This being the general rule, it is incumbent on the defendant to show that the parties have, by an express contract, restrained its operation in this particular case, and that the plaintiff agreed to discharge the defendant from the risk. There was evidence in the case applicable to this inquiry, and it is precisely the one that the jury should have been instructed to make. If the jury, omitting this line of investigation, discharged the defendant because they adopted the presumption stated by the court, that a person receiving a bank bill that was indorsed took it on the credit of the bank and the indorsement, they did so, in my opinion, on improper grounds. An indorsement upon a bank bill does not necessarily imply a guarantee of the bill, for it may be made, and generally is made, for various purposes unconnected with the paper's responsibility. It is most frequently made to be able to identify the note in case it is lost or stolen, and it is sometimes made by the receiver in the name of the person who passed to him a suspicious note, that he might be enabled to trace it if it should turn out to be a counterfeit. In truth, if ever intended as a guarantee, it is done under very peculiar circumstances, and such as may be and ought to be proved to take it out of the general rule; for this I take to be law, that an indorsement on a bank note of itself signifies nothing in the way of contract. (572) I think it very probable that the jury were diverted from the proper inquiry by the abstract proposition stated to them by the court, and that, instead of considering whether the plaintiff had taken the note upon his own risk, they hastened to the conclusion that he had taken it upon the responsibility of the indorser. Upon the merits of the case, as they may be evolved by the testimony, I do not presume to give any opinion. But I decidedly think that the case has not been laid before the jury in such a way as to enable them to decide the question really in controversy. On that account I am in favor of a new trial.

HALL and HENDERSON, JJ., being of this opinion, also,

PER TOTAM CURIAM. New trial.

Cited: S. c., 12 N. C., 445; *S. v. Corpening,* 32 N. C., 60; *Page v. Einstein,* 52 N. C., 149.

BAIN v. HUNT.—From Cabarrus.

Assumpsit will not lie on a judgment rendered by a justice of the peace.

WILSON, at a former term, read an affidavit made by the defendant, setting forth that a verdict had been rendered against him, and that he had intended to move for a new trial, but was prevented by the following facts: Court adjourned on Friday of the term to meet on the morning of the next day at the hour of 8, but the judge left the county on Saturday morning at 6 for his next court, and consequently defendant could not move for a new trial. On this affidavit a *certiorari* was moved for.

PER CURIAM. Let a *certiorari* issue as prayed for. And now, on the return of the writ at this term.

The proceedings in this case appeared to have been very irregular. It seemed to have commenced in Cabarrus County court by a writ in *case,* and afterwards to have been amended by changing the writ (573) to *debt;* a verdict was returned for defendant in the county court and the plaintiff appealed to the Superior Court, where the declaration was in *case,* and the jury found that the defendant did assume, and assessed plaintiff's damages to *six dollars and a half-cent* and costs. Plaintiff then made an affidavit that when suit was commenced his demand was just for more than $60, as it was also when the suit was tried, but that he had failed to establish it from the unexpected production of a witness whom he could have discredited; and judgment was rendered pursuant to the finding, whereupon there was an appeal to this Court. The declaration was for work and labor done, and for a judgment for $14 obtained before a justice of the peace.

J. Martin for the plaintiff.

TAYLOR, C. J. The judgment which is declared on in this case is compared to a foreign judgment on which *assumpsit* will lie; but, if

this position be correct, it follows that it is only *prima facie* evidence of the debt, and that upon the general issue of *non assumpsit* it is competent to the defendant to impeach the justice of the judgment by showing it to have been irregularly or unduly obtained, for in this action anything may be given in evidence that shows that nothing is due. Bull. N. P., 152. But I think it may be collected from the acts
on this subject that the Legislature meant to give judgments ren- (574)
dered by the magistrate a conclusive effect between the parties as
to the subject-matter of them, until reversed or set aside, to prevent the merits of them from being overhauled in an original suit; if they were not already recorded in the strict technical meaning of the term, to give them as much force as judgments rendered in any court of the State. I derive this inference, in the first place from the language of Laws 1802, ch. 609, which provides that when judgment shall be had, and execution not issued within twelve months thereafter, it shall be lawful to sue for and recover the same by warrant before a justice of the peace, and that the former judgment shall be evidence of the debt, subject to such deductions as the defendant may make appear on trial to have been paid in full or in part of said former judgment. By making it evidence of the debt must be understood conclusive evidence, especially where it is further prescribed that the effect of such evidence shall be avoided only by posterior payments. Thus it receives the qualities of a record which cannot be impeached by any supposed defect or illegality in the contract on which it is founded, the circumstances of which need not be stated. No averment can be made against the validity of a record; therefore, no matter of defense can be pleaded which existed anterior to the recovery of the judgment. That the Legislature considered such judgment as a debt of record further appears from Laws 1803, ch. 627, which withholds the stay of execution where the evidence of a debt on which the judgment is founded shall be that of a former judgment. And the subsequent act of 1820, ch. 1053, which limits judgments to three years, prevents their being revived by action, suit, *scire facias*, or other process after that time Though I am not aware of any act authorizing such judgment to be revived by *scire facias*, yet it had grown into practice before the law of 1820 authorized an original warrant; and as a
scire facias can be founded only on some matter of record, and to (575)
which the defendant cannot plead any matter which he might
have pleaded in the original, it further shows the light in which justices' judgments were received. In addition to this, it may be remarked that these judgments have ever been considered as debts of record in the administration of assets, and have stood upon the same footing with those rendered by the courts. Evidence of the same effect is furnished by Laws 1797, ch. 477, which allows, under regulations providing

for its authenticity, an execution to issue to another county from the judgment of a justice. The extensive civil jurisdiction conferred upon justices of the peace in this State, far from producing the public convenience, and aiding in the administration of justice in the degree intended, would be a positive evil and the source of endless litigation if their judgments were of no higher validity than simple contracts. A dissatisfied party against whom a recovery was had, instead of appealing or pursuing some other legal course to have the judgment reëxamined, would issue a new warrant to recover back the money; and if the principle were once established that a judgment might be opened and the cause of action again tried by another justice on the suggestion of mistake or injustice in the former trial, the consequences would be most mischievous. It is essential to the common security and peace that a principle sanctioned by so many adjudications should be maintained and enforced; that what has been regularly decided by a competent tribunal with regard to the same cause of dispute and between the same parties, or those succeeding to their rights, shall be conclusively regarded as true. Thus a recovery in any one suit upon issue joined or matter of title is conclusive upon the subject-matter of such title, and a judgment in such species of action is conclusive upon its own subject-matter, by way of bar to future litigation, for the thing thereby decided. 3
East, 346. And not only is an actual adjudication binding upon
(576) the parties, but even when a person who had paid a debt, but,
after being sued for it, could not find the receipt, and paid it over again, it was ruled that he could not afterwards, upon finding the receipt, maintain an action to recover it back. 7 Term, 269. It is better to suffer a private inconvenience than a public mischief; and as every human judgment, let it terminate when it will, may be subject to error, the possibility of it ought not to annul its validity unless in a course of appellate examination. That a rule so wise and well calculated to promote the tranquillity of society by shortening litigation should be adopted in the code of all civilized nations seems to have been expected. Accordingly, we find it to be a part of the Roman law, as explained by Justinian, November 23, and transplanted thence into the jurisprudence of most of the continental nations. In the civil law, as it is in force in France, it is stated by Pothier that the authenticity of *res judicata* induces a presumption that everything contained in the judgment is true, and this presumption, being *juris et de jure*, excludes every proof to the contrary, *res judicata pro veritate accipitur.* For instance, the party who is condemned to pay anything is presumed really to owe it; the party in whose favor judgment is given may consequently, after signifying it, compel the other to pay the money by the seizure and sale of his effects, and no proof can be received from him in contradiction

of the debt. 1 Pothier, 550. This is exactly conformable to the principle of the common law in relation to the plea of *nul tiel record* before remarked on. All the courts in this State, from the highest to those held by individual magistrates, administer the general law of the land, and have both civil and criminal jurisdiction. According to the definition of law writers, they are all courts of record; for although the proceedings of none of them are enrolled in parchment, yet a written memorial of them is or ought to be preserved. All courts of record are in England said to be the King's courts, and therefore no (577) others have authority to fine and imprison; so that the erection of a new jurisdiction with power to fine and imprison makes it instantly a court of record. 2 Salk., 200. Courts not of record are said to be those of private men, whom the law will not entrust with any discretionary power over the lives and fortunes of others. The proceedings of these courts are not enrolled, but their existence, as well as the truth of the matters contained in them, must, if disputed, be tried and determined by a jury. They cannot take cognizance of any matters cognizable by the common law, unless under the value of 40 shillings, nor of any trespasses, having no process to arrest the person of the defendant. 2 Ins., 311. This description of courts is unknown to us, and if the test of a court of record be that it has power to fine and imprsion, magistrates here must be so considered; for the power of giving judgment for fines, amercements, and penalties is conferred upon them in various instances. They were originally appointed as conservators of the peace, and their power at this day is chiefly conversant about the punishment and suppression of offenses. The civil jurisdiction which they exercise in this State is, in England, distributed among a great variety of inferior tribunals; but it cannot be inferred from the enlargement of their jurisdiction here that the authenticity of their acts is invalidated. They have, from the earliest times, been deemed judges of record, "and a memorial made by them of things done before them judicially in the execution of their office shall be of such credit that it shall not be gainsaid. One man may affirm a thing and another may deny it; but if a record once say the word no man shall be received to aver or speak against it; for if a man should be admitted to deny the same there never would be an end of controversies." 3 Burns, 3.

The other judges concurred.

PER CURIAM. Reversed.

Cited: Hamilton v. Wright, 11 N. C., 284, 286, 288, 289, 290, 291; *Humphreys v. Buie,* 12 N. C., 379.

(578)

DEN ON DEMISE OF MOORE v. McDUFFY ET AL., ADMINISTRATORS OF P. McRAE.—From Cumberland.

1. It seems that a trust may be created for the benefit of creditors by a deed of the existence of which they are ignorant, and that their assent to it may be presumed.
2. Yet where the trust is created expressly on the condition that they shall execute the deed by a certain day, and upon such execution certain obligations are imposed on them, they cannot incur the obligation without a performance of the condition.
3. If the creditors never signed the deed, the trust, if it arose at all, was for the benefit of the bargainors, and was such an interest as, under the act of 1812, ch. 830, might be reached by execution.

EJECTMENT, in which title to the premises in question was regularly deduced to David Hay. David Hay conveyed by deed to "Elisha R. Whiting & Co.," without naming the persons who composed the company. Whiting alone conveyed to Frederick J. Redfield, Redfield to William Lownes, and Lownes reconveyed to Redfield, who, together with Luron Whiting, describing themselves as the firm of Frederick J. Redfield & Co., then conveyed to William Moore, the lessor of the plaintiff.

The defendants exhibited a judgment and execution thereon from Cumberland County court against Frederick J. Redfield & Co. in favor of Durkin, Henderson & Co., and a sheriff's deed to Philip McRae (who afterwards conveyed a part to the other defendants) for the premises in dispute. The suit of Durkin, Henderson & Co. commenced by attachment 11 June, 1817.

On the trial of the cause it appeared that one Wallace & Whiting composed the firm of Elisha R. Whiting & Co., and it was objected by the defendants that the deed to Whiting & Co. conveyed to Wallace as well as Whiting. The objection was overruled, and on this point the jury was instructed that the deed conveyed no interest to any one but Whiting.

The deed from Redfield and L. Whiting to Moore was dated (579) 26 May, 1817, and purported to have been made for the benefit of certain creditors therein named, and of others who should subscribe the deed, and contained, among other things, this clause:

"It is further covenanted, understood, and agreed that this instrument shall remain open to the execution and signatures of all those creditors of the said Redfield and Whiting as shall choose to come in and sign and execute the same previous to the 1st day of August next; and all creditors of the said Redfield and Whiting, under the firm aforesaid, who shall fail to come in and annex their signatures to this instrument, either by themselves or by attorney duly authorized, before the said 1st day of August next, shall be entirely excluded and utterly barred from any participation in the dividend or dividends of the property conveyed by this deed," etc.

It did not appear from the case that any one of the creditors of Redfield & Co. had at any time assented to the deed to Moore or signed it, and it was objected by the defendants that as to them the deed was fraudulent and void. The point was reserved on the trial and a verdict was found for the plaintiff, subject to the opinion of the court on the question whether the deed to Moore was fraudulent in law as to defendants or those under whom they claimed, no fraud in fact appearing. The court held that there was nothing on the face of the deed to authorize it to pronounce it fraudulent, and gave judgment for the plaintiff, from which defendant appealed.

TAYLOR, C. J. The trusts declared in the deed to the plaintiff are that he shall pay all the creditors of Redfield & Whiting who shall sign the deed by 1 August, 1817; and there are certain covenants in the deed binding those creditors to divers acts as soon as they have executed the same. Admitting that a trust may be created for the benefit of creditors by a deed of the existence of which they are ignorant, and that their assent to it may be presumed, yet this case is subject to a very different construction, for the trust is created expressly on the condition that they shall execute the deed by a certain day, and then certain (580) obligations are imposed upon them, which surely they never can incur without a performance of the condition. Now, it does not judicially appear that the creditors ever executed the deed, and, of course, William Moore did not become a trustee for them. There are signatures and seals to the deed, but whose they are we have no means of ascertaining.

It results from this view of the case that the trust, if it ever arose, existed only for the benefit of the bargainors, and that the property in the hands of the trustee was liable to their creditors, as they could entitle themselves by legal process, it being such property as is made liable to execution by the act of 1812, ch. 830. There must be a

PER CURIAM. New trial.

SMITH v. BROWN.

1. Parol evidence, according to the general rule, is inadmissible to vary or contradict a contract reduced to writing. By a variety of decisions, ordinary receipts do not appear to be subject to the operation of the rule,

because they do not contain evidence of a contract, but of payment in discharge of a contract; but when, in addition to the receipt of money, a condition is annexed upon which alone the party shall become liable to a further payment, it assumes the nature of a contract, and must be governed by the same rules of evidence.

2. If an obligor pay a *less* sum than is due, either before the day specified or at another place than is limited by the condition, and the obligee receive it, this is a good satisfaction.
3. Accord and satisfaction made before a breach of a covenant cannot be pleaded in bar of an action on the covenant; but where any damage has accrued under the deed the accord may be pleaded in discharge of such damage.

COVENANT brought upon charter-party of affreightment, tried before *Badger, J.*, at CRAVEN.

On the trial it appeared that the material stipulations of the (581) charter-party were that the plaintiff let to freight to the defendant the schooner *Enterprise*, of which he was owner, for a voyage from New Bern to the island of Bermuda, and from the island of Bermuda back to New Bern, the schooner to be at the risk of the owner during the voyage. The plaintiff covenanted that the schooner was, and should be during the voyage, staunch and strong, sufficiently tackled and appareled, etc.; and the defendant covenanted to pay to the plaintiff for the freight of the vessel $235.50 per month, commencing from the date of the charter-party, and so in proportion for a less time, as the vessel should be continued in the said service; the freight to be payable in five days after the return of the vessel to New Bern, or in five days after the voyage should be otherwise in any manner determined and notice thereof given to the defendant. The deed bore date 21 October, 1819.

In a few days the schooner commenced her voyage, and arrived at Bermuda on the ninth day after getting to sea; the lading was disposed of and the master put to sea on his return. The night after leaving Bermuda he met with heavy weather, and it continuing boisterous, with severe gales from the northwest for more than thirty days, on 16 January, in the evening, the master found himself near the coast; and being satisfied, from the condition of the vessel and state of the weather, that she must perish during the night, he ran her ashore while there was light enough to save the lives of the crew. The vessel soon after went to pieces and was lost.

On 3 February, no tidings having reached New Bern of the vessel, and the parties being ignorant of the result of the voyage, the defendant paid to the plaintiff the sum of $502.40, and the plaintiff executed a receipt for the same in the following words:

Received, New Bern, 3 February, 1820, of Sylvester Brown, (582) $502.40, which amount it is understood by the parties shall be in full consideration for the charter of the schooner *Enterprise* on a voyage to Bermuda and back to the port of New Bern, provided the said schooner shall not arrive at the aforesaid port of New Bern at any time after 25 December last; but should the said schooner arrive at the port of New Bern at any time after 25 December last, the charter-party is to receive the same construction as though the above receipt had not been given. NATHL. SMITH.

On the trial the defendant offered the payment and the receipt in evidence in support of the plea of "accord and satisfaction." The plaintiff's counsel then offered to give in evidence the deposition of one Beverly Rew to explain this receipt (there being no fraud alleged in the transaction). The deposition had been regularly taken, and contained a statement to the following effect: Rew was present at the plaintiff's store when a settlement took place between the plaintiff and the defendant on account of the charter-party, and was called on by the plaintiff to take notice of the terms of the settlement. The defendant brought the receipt written; the plaintiff objected to the form of the receipt, on which the defendant said if the plaintiff would sign the receipt it would make no difference, as there was very little doubt but that the vessel was lost and would never be heard of again; but if she returned or was heard of, the charter-party would remain in full force as if no payment had been made. The plaintiff proposed to write a new receipt, but the defendant said he was in a hurry and it would make no difference.

The admission of this deposition was opposed on the part of the defendant, because it went to contradict or vary the written instrument, and to show that the payment was made and received on terms other than those stated in the writing itself; and the presiding judge rejected the evidence.

If freight were calculated up to the determination of the voyage by the loss of the vessel, there would be due on the charter-party $170 more than the sum paid to the plaintiff, and for that excess the plaintiff claimed a verdict, his counsel insisting that the receipt not under (583) seal could not operate to discharge the deed, and that the payment and the written instrument did not amount to an accord and satisfaction because it was the payment of a less sum in discharge of a greater. The presiding judge held that this was an accord with satisfaction to support the plea, and directed the jury to find for the defendant, which they did.

A new trial was moved for because of error in the judge: first, in rejecting the deposition of Rew; and, second, in instructing the jury that there was a sufficient satisfaction to support the plea. New trial refused; judgment, and appeal.

Ruffin for plaintiff.
Gaston contra.

TAYLOR, C. J. The compromise seems to have been made by both parties, under an expectation that the vessel had been lost before or at 25 December; until which time Brown agreed to pay the freight and Smith to receive it in full discharge of the vessel's earnings, with the exception only that if she returned after the 25th Brown should be further liable. In the event of her having been lost before the period settled between the parties, Brown had paid money to which the charter-party had not made him liable; in the event of her being lost after that time, Smith had lost money to which he would have been entitled by the original contract. The effect of the parol evidence offered was to make Brown liable to further freight upon another event not stated in the settlement, and in positive contradiction to it, and in addition to that of the vessel's return after the 25th—in other words, he should not only pay additional freight if the vessel returned after 25 December, but he should also do so if she was heard of after that time. The contract of the parties is reduced to writing, and is most likely to contain the (584) stipulations they really made; the part not so written down rests upon the memory of a witness who may have misunderstood the parties or whose memory may have betrayed him. If this were to be the construction of the written compromise, it may be asked what advantage could Brown derive from it in any manner. If the settlement made him liable for the freight after the vessel returned to New Bern, and if by the charter-party he was also liable after the voyage was determined, he was left by the compromise where the charter-party had placed him, with the additional inconvenience of having advanced a considerable sum of money before he was liable, if liable at all, to pay it. It does not seem probable that he would have advanced this money without the prospect of some reciprocal advantage; and I do not see how he could receive any except in the purchase of an exemption from liability for freight for a loss happening after 25 December. It appears to me that to admit parol evidence in this case would introduce the very mischief to guard against which the rule was first established. Prudence and caution in the management of affairs would be vain if men were not able to discover the engagements they had imposed on themselves by inspecting the documents they had intended to contain the sole evidence of them. If contracts may be composed partly of writing and partly of words, dependent on the memory of witnesses, then no man can tell, till a trial comes on, the extent of his liabilities. In *Powell v. Edmonds* there were printed conditions of sale of timber growing in a certain close, not stating anything of the quantity, and parol evidence that the auctioneer at the time of sale warranted a certain quantity was rejected, the Court saying the purchaser ought to have had it reduced to writing at the time, if the representation then made as to the quantity swayed him to bid for the lot. That if parol evidence were admissible in that case, they knew of no instance where a party may not, by parol testimony, superadd any term to a written agreement, which would be setting aside all written contracts (585) and rendering them of no effect. 12 East, 10. It is true that by a variety of decisions receipts do not appear to be subject to the operation of the rule, because they do not contain evidence of a contract, but of payment or discharge of a contract; but when, in addition to the receipt of money, a condition is added upon which alone the party shall become liable to a further payment, it assumes the nature of a contract, and must be governed by the same rule of evidence. It must be considered as conclusive proof that the party signing has relinquished all other conditions than those specified. However, there does not appear an entire uniformity of opinion even as to receipts; for in *Almer v. George,* 1 Campb., 392, the judge held that a receipt in full, where the person who gave it was under no misapprehension and could complain of no fraud or imposition, was binding upon him. With respect to the objection that this is not an accord and satisfaction, because the sum paid was less than had become due, at the date of the contract, it is to be observed that, according to the charter-party, the freight was payable in five days after the return of the vessel to New Bern, or in five days after the voyage should be otherwise in any manner determined, and notice thereof to the defendant Brown. Now, though the voyage was determined when the money was paid, neither party had notice of it, and the freight consequently, though due, was not payable. This brings it within the rule in *Pinnel's case,* 5 Co., 117, that if the obligor or lessor pay a less sum, either before the day or at another place than is limited by the condition, and the obligee or feoffee received it, this is a good satisfaction.

It is further objected to the plea that an accord and satisfaction made before breach of a covenant cannot be pleaded in bar of an action on the covenant. The rule is a correct one, for the action being founded on a deed, *that* can only be discharged by a deed; but when any damages have accrued under the deed the accord may be pleaded in discharge of those damages. And the cases cited show this dis- (586)

tinction plainly. In *Snow v. Franklin,* 1 Lutw., 358, the accord was made before the rent became due, and if the plea had been sustained the effect of it must have been to discharge the deed by parol. In *Kaye v. Waghorne,* 1 Taunton, 427, the covenant declared on was a covenant to levy a fine upon request; and the accord pleaded was that before the request made it was agreed between the parties that the defendant should give a bond of indemnity against his wife's claim of dower. There were two fatal objections to this plea: one was that nothing was due to the plaintiff when the accord was made; the other, that the accord was executory. But whenever damages have accrued by reason of the breach of the covenant, an accord executed is a good plea in discharge of them. And to this effect are all the cases. Cro. Jac., 99; *Blake's case,* 6 Co., 43b.

In the case before us Smith had, at the time of the accord, a right to nearly three months freight then due, though *solvendum in futuro,* a claim which might then have been released by him, and for which he might acknowledge satisfaction. Litt., sec. 512. For these reasons, I think there is no error in the judgment of the Superior Court, and that it must be affirmed.

HENDERSON, J., concurred in this opinion.

HALL, J., *dissentiente:* I confess I entertain doubts respecting the opinion given by my brethren in this case. It may be taken for granted that where it is proper to explain a writing, not under seal, by parol evidence, it may be done in a court of law as well as in a court of equity; and I grant that when it appears to be the intention of the parties to commit their contract to writing, whether under seal or not, and they do commit it to writing, it is not to be explained by parol evidence in any court, unless for fraud, mistake, etc. Examine this case by these rules. Did the parties consider at the time that they had committed their contract to writing? (587) It appears from the evidence that Smith objected to signing the writing; he was told by Brown that his signing made no difference; that if the ship was heard from, the charter-party should have the same construction as if the writing was not signed. This was the contract; it was not confined to the arrival of the ship at New Bern. It seems that the writing was considered as a receipt for so much money at all events, but not a writing containing all the terms of their contract; it was a settlement in case the vessel did not arrive or was not heard from. It cannot be objected that the contract is not mutual, as explained by the parol evidence; for suppose it had been ascertained that the vessel had been lost one month after her departure, the plaintiff would have been bound to return part of the money which he received as freight. *Streator v. Jones, ante,* 423, decided last term.

PER CURIAM. No error.

Cited: Matthis v. Bryson, 49 N. C., 510; *Wilson v. Deer,* 69 N. C., 139; *Overby v. B. and L. Assn.*, 81 N. C., 62; *Williams v. R. R.,* 93 N. C., 45; *Grant v. Hughes,* 96 N. C., 190.

RICKS v. COOPER.—From Nash.

To counterfeit any writing with a fraudulent intent, whereby another may be prejudiced, is forgery at common law. Therefore, when the defendant charged the plaintiff with having forged a letter in his (defendant's) name, containing this clause, "I have to inform you that I have received your money, and want you to come and receive it," an action of slander was maintainable.

CASE for slander, in which the jury found a special verdict as follows: "That the defendant maliciously and falsely spoke these words of the plaintiff, viz.: that he (meaning the plaintiff) had forged and sent to William Tisdale the following letter, to wit:

NORTH CAROLINA, Nash County, 13 February, 1821.

DEAR SIR:—I take this opportunity of writing a few lines to you, informing you that we are all well at present, thanks be to God, hoping these few lines may find you the same. I have to inform you that I have received your money, and want you to come and receive it.

I am, with respect, yours, etc., GEORGE COOPER. (588)

If the court should be of opinion that the action can be sustained in consequence of the defendant's thus speaking, then they assess the plaintiff's damages to $5. If the court should be of opinion that the action cannot be sustained on the speaking as aforesaid, then they find for the defendant; and they ask the advice of the court.

The court gave judgment for the plaintiff on this finding, and the defendant appealed.

Drew for plaintiff.
Hillman contra.

TAYLOR, C. J. It cannot be doubted that the words, as charged in either count of the declaration, are actionable, if taken by themselves;

and the inquiry then is whether the explanation and reference of them, as found by the jury, so qualifies their meaning as to render them innocent. This depends solely on the question whether writing the letter set forth would amount to a forgery. That it would at common law is apparent from the definition of that offense, which might be committed in respect of any writing whatever by which another might be defrauded. Whatever doubt might formerly have existed on the subject was completely removed by the decision in *Wood's case*, in which the distinction is taken between forgery and fraud; that the last must actually take effect, while the first was complete, though no one was actually injured, if the tendency and intent to defraud were manifest. 2 Ld. Ray., 1461. The tendency and intent of the letter imputed to the plaintiff are evidently to render the supposed writer liable to Tisdale for a sum of money; and supposing the letter to be genuine, Tisdale might have recovered upon its face without any extraneous proof sufficient damages to carry the costs. But it is needless to pursue the inquiry, because it seems now to be understood that it is not necessary to constitute
(589) forgery that there should be an intent to defraud any particular person, but that a general intent to defraud will suffice. 3 Term, 176. On this part of the case, therefore, I am of opinion that the words are actionable as explained by the finding of the jury. But it is objected that the slanderous words are not stated in the declaration as they were uttered, according to the finding of the jury. It is to be observed, however, that the words laid are actionable *per se*, and the additional circumstances stated in the special verdict are only explanatory of the subject in reference to which the words were spoken; for as the jury must judge whether the words were innocently or maliciously uttered, it is proper to give in evidence the occasion and manner of speaking them. Where the additional words do not qualify the words laid in the declaration, or divest them of their slanderous character, it is not necessary that they should be charged. In *Higges v. Austen*, Yelv., 152, the words are, "Thou hast stolen as much wood and timber as is worth £20." The jury found the words with this addition, "off my landlord's ground," and it was adjudged for the plaintiff, for the words found by the jury, more than were in the declaration, do not qualify the first words. And in *King v. Drake*, 2 Salk., 661, it was held that where one declares for words spoken, variance in the addition or omission of a word is not material; and it is sufficient if so many of the words are proved and found as are in themselves actionable. In *Maitland v. Goldney*, 2 East, 438, *Mr. Justice Lawrence* says: "I take the rule in actions of this sort to be that though the plaintiff need not prove all the words laid, yet he must prove so much of them as is sufficient to sustain his cause of action, and it is not enough for him to prove equivalent words

of slander." For these reasons I think the judgment should be affirmed.

HALL, J. It was formerly doubted whether counterfeiting writings inferior to deeds and wills was forgery at common law; (590) but it seems now to be settled that to counterfeit any writing with a fraudulent intent, whereby another may be prejudiced, is forgery at common law. 2 East Cr. Law, 359, 861; 2 L. Ray., 1461; 2 Str., 747. Accordingly, to counterfeit the letter set forth in this special verdict, with a fraudulent intent, is forgery at common law, because an injury might thereby accrue to the defendant. Suppose Tisdale had sued the defendant for money had and received to his use, this letter would be evidence against him; and although it does not specify any sum received by the defendant, yet it is proof that he received something, and might be the foundation of a verdict against him for a nominal amount, and subject him both to trouble and cost.

For these reasons I concur in the opinion that judgment should be rendered for the plaintiff.

HENDERSON, J., concurring, also.

PER CURIAM. No error.

SMITH v. CAMPBELL.—From Halifax.

The acts enlarging the jurisdiction of justices of the peace do not violate the fourth article of the Bill of Rights.

THIS was a suit originally commenced by warrant on a note for $25, and the only question presented on the appeal of the defendant was on the constitutionality of acts of the General Assembly which give to a single individual the right to decide "a controversy at law."

R. Potter on behalf of appellant.

HENDERSON, J. The warrant commands the defendant to appear at the suit of the plaintiff before a single justice of the peace (596) (a court without a jury) to answer him for the nonpayment of a debt of $25. The case, therfore, depends on the question, Is this a controversy respecting property according to the meaning of those words as used in section 14 of the Declaration of Rights? That section declares that in all controversies at law respecting property the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable. At the time this declaration was made, and long before, a single justice of the peace, out of doors, a court similar to the one before which this defendant is called in all respects except as to the sum over which it has jurisdiction, had cognizance of all demands arising upon contracts to a very small amount. This jurisdiction has, from time to time, been much enlarged as to the sum over which the justice's court has cognizance; it adjudicated without the aid of a jury. From the phraseology of the section I think it is plain (597) that, in the opinion of the authors of the declaration, a controversy respecting a *debt* was not a controversy respecting property; that a debt was not property; for if it was, they would not have used the words *remain sacred and inviolable;* to remain, to be, to continue as it is. The word "remain" supposes a present state of things, which is to continue; and if in all trials at law respecting property there must be a jury, the principle is as much violated when one cent is the subject of controversy as when $10,000 are. Nor can the words be at all satisfied by permitting the jurisdiction to remain as it then stood; that is, not to increase the amount; for the words are, "all controversies at law respecting property," not "all controversies to a certain amount." But I think there can be no doubt when the other parts of the section are considered. The words respecting property are restrictive of the words, "all controversies." What controversies are without the restriction? Criminal prosecutions? They could not be intended, for they are provided for by section 9. Besides controversies respecting property there are but two others: controversies respecting debts or duties, and controversies respecting rights. If they are included under the description respecting property, then these words are useless and vain. The section has the same meaning without them as with them. They lose entirely their restrictive effect; for, according to the opposite argument, controversies respecting property mean all controversies whatever, except criminal prosecutions, and they are provided for by another section. But a debt or duty is not property in the proper sense of the word, although to comply with the intent it is often so taken. Property is a thing over which a man may have dominion and power to do with it as he pleases, so that he violates not the law. He may give, grant, or sell it at his pleasure. A person has an *interest* in a *debt* or *duty;* but a *property* in a *thing* only, either natural or artificial. He cannot (598) give or grant a debt or duty, because it is not property; not because, as some supposed, the law through policy will not permit a thing in action to be given or granted; it is because this thing in action is not property that it cannot be granted. A rent service, a rent charge, a rent seck, may be granted, because the law recognizes it as property. And a mere covenant, when annexed to an estate, may be granted, because it is annexed to property. If the objection to granting a debt or duty is referable to policy, why permit these rents, or covenants annexed to an estate, to be granted? A rent charge, or a rent seck, is a right to demand money of another; but being recognized by law as property, it immediately thereby becomes the subject of a grant. A debt or duty, although evidenced by bond or note, is not the subject of larceny, because they are not property. Even bank notes are not the subject of larceny, although payable to bearer. And for the same reason a person cannot have a property in them; they are not the subject of property. I speak of these things at common law; that is in their nature; the acts of our Legislature have lately made it larceny to steal most of them. In addition to the above, there has been for nearly fifty years an exposition of this section in conformity to the above principles. The jurisdiction has been much enlarged, but not extended to controversies respecting property to the amount of one cent. I concur in the argument of the defendant's counsel, that the word *ought,* in this and other sections of the instrument, should be understood imperatively. It is sufficient for the creature to know the will of the creator. Obedience is then a duty without an express command.

The other judges concurring in this view of the clause referred to

PER CURIAM. Affirmed.

Cited: *R. R. v. Davis,* 19 N. C., 465; *Hurdle v. Outlaw,* 55 N. C., 79; *Froelich v. Express Co.,* 67 N. C., 7; *R. R. v. Parker,* 105 N. C., 248; *Duckworth v. Mull,* 143 N. C., 4.

(599)

LITTLE AND OTHERS v. MAY.

The design of notice of an intended petition to lay off a road is that the owners of the land may come forward and object; but the act did not intend that the establishment of a necessary road should be impeded for the want of twenty days notice, if, before an order is made for laying off the road, ample notice is given to the owner. Where, therefore, a petition for a new road is filed, and is continued in court three years, during which time the owner of the land opposes the petition, continues the cause, appeals to the Superior Court, etc., he cannot, after these steps taken by him, object to the want of twenty days notice, for his conduct shows that he has had ample notice.

APPEAL from *Norwood, J.,* dismissing an appeal taken by the defendant from the decision of ANSON County court in the matter of a road.

Little and others, at October Term, 1821, filed a petition praying to have a new road laid off, and gave notice in writing of their intention so to do all who owned the land over which it would pass, except to themselves, the petitioners, and to one William May, who, it was alleged, owned some of the land. The cause was continued on the docket until January Term, 1822, and from that term to April Term, 1822, the pendency of the petition was duly advertised at the courthouse door. At April term Daniel May, who opposed the petition, had the cause continued until July Term, when the county court directed a jury to lay off the road, etc., and return their proceedings to the next court. From this order Daniel May appealed to the Superior Court.

In the Superior Court motions were submitted on both sides. The defendant moved to dismiss the petition on the ground that notice in writing had not been given to William May, who was the son of Daniel; and to prove W. May's ownership, he read a conveyance from one of the petitioners to himself for land over which the contemplated (600) road would pass, dated 13 August, 1821; this deed was neither proved nor recorded; and a deed from himself to W. May for the same land, dated 15 September, 1821, acknowledged by the defendant at October Term, 1822, and registered in December following. William May was proved to have been of the age of 18 years at the time the deed bore date, was living with his father, and not about to settle himself; and there was contradictory evidence as to the time when the deed was really executed.

To this it was answered, first, that the objection of want of notice should have been made at an earlier stage of the proceedings, in the county court, on the hearing of the petition; second, that W. May was not owner of the land when the petition was filed, nor was he now, because the deed to the defendant was not proved and registered, and the deed from the defendant to W. May was not proved and registered until after the judgment in the county court; and, third, that filing the petition at January Term, 1822, and continuing it over to April, 1822, with public advertisement in the meantime, is notice to all persons under the act of 1813, ch. 862, N. R.

The plaintiffs moved to dismiss the appeal, first, because the appeal bond was made payable to Little only, and not to all the petitioners, and was signed by but one security, who had not affixed his seal to his signature; second, on the ground that it was an appeal from an *interlocutory* judgment, the final judgment in such cases being to confirm the report of the jury, etc.

The judge dismissed the appeal and directed a *procedendo* to the county court, whereupon the defendant appealed to this Court.

TAYLOR, C. J. The design of the notice required by the act of 1813 is to enable the owners of land over which the new road may run to come forward and urge to the court such objections, either of a public or private nature as may show it to be inconvenient, useless or unjust; but it certainly was not intended that the establishment (601) of a useful public road should be impeded by the omission of twenty days previous notice if, before the order for laying off the road is made, ample notice is given to the owner to enable him to provide evidence and make a defense. It appears, in this case, that Daniel May had notice at October session of the county court in 1821, at which time he opposed the petition; and if at that time the order had been made for laying off the road the want of twenty days previous notice would have been fatal to its validity. But from that time he continued to defend the petition; it was continued once at his request; he carried it up by appeal to the Superior Court; and if after a notice of three years he could not prepare for his defense, the notice of twenty days prior to filing the petition would have availed him but little. The decision of both courts was made with full notice to the defendant; and it is impossible to sustain the objection now taken without manifest injustice. Notice to Daniel May is equivalent to notice to William, who was a minor and lived with him.

PER CURIAM. Affirmed.

Cited: S. v. Smith, 100 N. C., 554.

LEACH v. STRANGE.—From Cumberland.

An attorney at law is not entitled to retain a commission of 5 per cent on the amount of a bond placed in his hands for collection where the money is paid into the clerk's office and the plaintiff applies in person for it.

THIS was a suit commenced by warrant for money had and received by defendant to plaintiff's use.

The evidence in the court below was as follows: The defendant, who is an attorney practicing law in the courts of this State, was applied to by the plaintiff, residing in Johnston County, to bring suit in Cumberland County court on a note for $467. The defend- (602) ant took the note, gave his receipt for the same, caused a writ to be issued, became security for costs, placed it in the sheriff's hands, and on its return, as attorney for the plaintiff, obtained judgment, and caused execution to issue. The sheriff collected the money and paid it into the clerk's office, where the plaintiff applied for it. The clerk, not knowing the plaintiff, asked the defendant what he should do with the money, when he was directed to pay it to him, the defendant and attorney of record, who received it accordingly and gave the clerk his receipt for it. After the defendant had taken from the money a sum equal to 5 *per cent* he paid the residue to the plaintiff, who objected to his retaining the 5 per cent, and brought this warrant to recover the same; the defendant had also received and retained the taxed fee of $4. It was stated by gentlemen of the bar, who were examined, that they had uniformly charged and received from their clients, when they lived out of the county where the judgment was obtained, a commission of 5 per cent, when they gave the client a receipt for collection, and collected and paid over the money, and this commission they had always claimed, notwithstanding the clerk or sheriff might have been applied to by the client for the money.

The jury was instructed that the fee of $4 was allowed by law for the professional services of an attorney in court, making up the pleadings, drawing affidavits, arguing rules, and the cause itself, attending to the entering up of judgment regularly, and the issuing of execution thereon, and perhaps to all motions against sheriffs and clerks in and concerning the execution. The attorney was not bound by law to apply to the clerk for a writ, much less was he bound to find security for its prosecution; he was not bound to carry the writ to the sheriff, nor was he bound to place the execution in the sheriff's hands, or attend to any business out of court. If the jury collected from the evidence (603) that the defendant acted as the agent of the plaintiff in performing services relative to the suit, which did not come within the duties of an attorney as before mentioned, and if they collected that he had performed these or any services by the request of the plaintiff, then the law would imply a promise on the part of the plaintiff to pay as much as such services were reasonably worth; the price of such services was a question solely for the jury; they were not obliged to give 5 *per cent;* they had it in their power to say, first, whether, from the evidence, the defendant had done the plaintiff any services other than those which formed part of his duty as an attorney at law; and, second, if he had so done services at the plaintiff's request, they had a right to fix such a price for such services as they believed to be reasonable; and if they thought the defendant's charge too great, they might reduce it as in any other case.

There was a verdict for the defendant, whereupon plaintiff moved for a new trial on the ground of misdirection as to the law, which, being refused and judgment rendered, plaintiff appealed.

HALL, J. I collect from the evidence and the charge of the court upon it that it was the opinion of the judge that the defendant was entitled to some compensation for collection. I think when the plaintiff, in his own person, applied to the clerk for the money, it was a countermand of any agency which the defendant would have otherwise had to collect the money. Although the defendant had received the bond to collect its amount as agent of the plaintiff, the plaintiff might at any time discharge him from that agency, though at the time of such discharge he would stand indebted to him for any services he might have rendered previous to that time. I think the rule for a new trial should be made absolute.

The rest of the Court concurring.

PER CURIAM. New trial.

STOWE v. WARD AND OTHERS.

1. Devise as follows: "It is my will, and I do allow, that all the remaining part of my estate, both real and personal, be equally divided among the heirs of my brother, John Ford, the heirs of my sister, Nanny Stowe, the heirs of my sister, Sally Ward, *deceased*, and nephew, Levi Ward." The testator in a former clause had taken notice that his brother, John Ford, was *alive;* Levi Ward was one of the children of Sally. *Held,* that the word *heirs* was used in the sense of *children,* and as a designation of the persons. The division must be *per capita.*
2. The testator's affection for and preference of Levi cannot be shown by parol evidence, but the will, furnishing evidence that he was a favorite nephew and an object of peculiar bounty, the devise to him by name shall not be considered a repetition of the first as one of Sally Ward's children; he shall have an additional share.

PETITION filed to obtain partition of certain lands described in the petition, which came on for hearing before *Badger, J.,* at Fall Term, 1824, of LINCOLN.

The object of the parties was to procure the opinion of the court upon the construction of a devise in the will of Nathan Ford, deceased.

The facts, as stated by the parties at the hearing, were these: The testator, being seized in fee simple of the lands described in the petition, and possessed of a considerable personal estate, duly made and published his last will and testament, which after the usual introduction, proceeds to devise in these words:

"I give and bequeath to my brother, John Ford, 200 acres of land, including where he, the said John, now lives, during his natural life, and at his decease the said land to fall to his, the said John Ford's children.

"Item: I give and bequeath to my nephew, Levi Ward, my sorrel horse called Murlin, and my negro boy named Dub, to him, his heirs and assigns forever.

"Item: It is my will, and I do allow that all the remaining part of my estate, both real and personal, *be as equally divided amongst the heirs of my brother, John Ford, the heirs of my sister Nanny Stowe, the heirs of my sister Sally Ward, deceased, and nephew, Levi Ward.*"

At the time of making this will, and at the time of his death, (605) the testator had living his brother John Ford, who had four children, Polly, Martha, George, and John; and his sister Nanny Stowe, who had nine children, Littlebury, Larkin, Leroy, Lemuel, Jacob, Polly, Abram, Whitten, and Pinkney. At that time the testator's sister Sally Ward was dead leaving two children, Sally Ward and Levi Ward. Levi is the nephew mentioned in the will, who had then resided with the testator (who was unmarried and without children) for fourteen years, transacting his business for him as his agent and to his satisfaction.

The presiding judge below was of opinion upon this case that the several *families* of his brother and sisters, and not the *individuals* composing them, were the objects of the testator's bounty; that the *equality* of division intended by the testator was between the several families designated and the nephew Levi Ward; that the children of John Ford were entitled to one fourth part of the real estate, the children of Nanny Stowe to one other fourth part, the children of Sally Ward, the sister (excluding Levi Ward) to one other fourth part, and the said Levi Ward to the remaining fourth. And a decree of partition was made accordingly. The commissioners having returned the partition made by them according to this decretal order at the succeeding term of the court below, the then presiding judge (*Paxton*) made a final decree of confirmation thereon, whereupon the petitioner appealed to this Court.

Wilson for appellee.
J. Martin contra.

TAYLOR, C. J. On a recent case in chancery a question arose upon a bequest of one fourth to the children of A. and one other fourth (606) to or among the children of B., whether it should be divided *per capita* or *per stirpes,* and it was decided that the distribution should be *per capita. Linch v. Pelham,* 10 Vesey, 167. I beg leave to cite part of the chancellor's opinion in that case, because it coincides with the opinion I had entertained in this from its opening, and because I felt the importance of the sentiments inculcated many years ago, when I joined in the decision of *Whitehead v. Pritchard,* 5 N. C., 382: "Upon the next question, whether the distribution is to be *per stirpes* or *per capita,* I am not quite sure that my opinion is not against the intention. If there is a settled construction, founded upon cases decided, applying to the terms used, it is better to adhere to that settled construction, though I may entertain some doubt whether it is according to the intention, than upon grounds on which I cannot rest in every view of the case, to come to a decision having a tendency to shake that which forms a rule of construction, and which in practice may have been acted upon in many cases. It is clear that if this had been a bequest to the younger children of two persons, equally to be divided between and among them, the division would be *per capita.* That rule has been applied in many instances upon which doubts have been strongly raised; for instance, a gift to a brother and the children of a deceased brother, who, without a will, would take *per stirpes;* yet it has been held that though the law would have given it in moieties, that is not the effect of an express bequest."

There, is in my opinion, a settled construction upon all devises of the nature of that now before us recorded in a series of decisions to be traced back for more than a century, by the aid of which any counsel, upon an inspection of a will, can advise his client as to the extent of his interest. I should deprecate such a departure from these adjudications as would leave judges nothing to guide them but the obscure and often undiscoverable intentions of the testators.

As the devisor takes notice in his will that his brother John (607) Ford is alive, by making a special devise to him no doubt is left that he used the word "heirs" in the sense of "children" and as a designation of the persons. They necessarily must carry the same meaning when applied to the heirs of Nancy Stowe, and still more clearly in relation to those of Sally Ward, whom he states to be dead. All these devisees are of equal kin to the devisor in their own persons, though making out their pedigree through different stocks, and would, were the parents of all dead, be entitled, under the *statute of distribution,* to a division *per capita.* And this I take to be the proper construction of the will, according to the principles established in the following cases, which are not essentially distinguishable from this: *Blaklen v. Webb,* 2 P. Wms., 383; *Wild v. Bradbury,* 2 Vern., 705; *Northey v. Strange,* 1 P. Wms., 340; *Malcolm v. Martin,* 3 Bro. C. C., 50; *Butler v Stratton, ibid.,* 367; *Thomas v. Hole,* Forr., 251; *Green v. Howard,* 1 Bro. C. C., 31; *Phillips v. Gath,* 3 Bro. C. C., 64; *Rayner v. Mowbray,* 3 Bro. C. C., 234.

In relation to the share of Levi Ward, it would be impossible to collect the testator's preference and affection for him from any parol evidence, and therefore no notice is taken of the facts alleged on the record. But there is on the face of the will sufficient evidence that he was a favorite nephew, by the specific bequest made to him in the first clause, and the express devise made to him by name, after the provision made for him as one of the heirs of Sally Ward. These circumstances too strongly point to the fact of his being an object of peculiar bounty, and will not admit of the rejection of the devise to him by name as being a repetition of the first. The intent of that was to give him an additional share, and this I think ought to be the devise.

Cited: S. c., 12 N. C., 67; *Ricks v. Williams,* 16 N. C., 10; *Ward v. Stowe,* 17 N. C., 519; *Bible Society v. Hollister,* 54 N. C., 14.

DAVIS AND WIFE AND OTHERS v. COOKE.

By a strict and literal construction of the Act of Limitations, an infant must bring his or her action within three years after coming of full age, although he or she shall be *covert, non compos*, imprisoned, or beyond seas before that period arrives. This, however, is not the obvious construction of the act, and a different one has obtained generally in this State since the passage of the act in 1715, and will, therefore, be adhered to by the Court; so that if an infant female having a right of action marry before coming of full age, she is not bound to sue within three years after arriving at full age; her coverture protects her.

(608) DETINUE for a negro slave named Sarah, tried before *Badger, J.*, at CARTERET. A verdict was taken for the plaintiffs, with leave to the defendant to move to set it aside and enter a nonsuit on the question presented by the following case:

The negro slave in question was the property of George Bell, who by his will bequeathed the same to his widow for life, with remainder to the plaintiffs Keturah, Clorinda, or Cloe, and Mary David. The testator died in 1794, and the executor, having proved the will, assented to the legacy, and put the slave into the possession of the tenant for life, who in 1796 died. In the same year one Nathaniel Pinkham took actual adverse possession of the slave, claiming her as his own, and retained possession until 1815, when he sold her to Thomas Cook, who took and retained possession until his death, when the slave passed into the hands of the defendant as the administrator of Thomas Cook, and he hath ever since retained possession.

At the time the adverse possession of Pinkham commenced the plaintiff Keturah was an idiot and infant, and hath continued *non compos mentis* ever since.

The plaintiff Clorinda was born in April, 1782, and died an infant in 1802, and this action was brought within three years after the first letters of administration granted of her estate.

The plaintiff, Mary Davis, was born January 1787, and was (609) married in 1803, then an infant under the age of 21, and hath continued covert of her said husband, the plaintiff Thomas C. Davis, ever since.

This action was brought 18 February, 1822. If, upon these facts, the action of the plaintiffs is barred by the statute of limitations, then the verdict to be set aside and a nonsuit entered; if otherwise, the verdict to stand and judgment to be entered.

The presiding judge held that the action was not barred by the statute, and rendered judgment accordingly, whereupon the defendant appealed.

Ruffin for appellant.
Gaston contra.

HALL, J. The disabilities expressed in our statute of limitations have all the same effect; neither of them is greater or less than another. A person, whether laboring under all or any of them, is equally excused bringing suits, because all or any one of them incapicitates and destroys free agency. All of them create no greater incapacity than one of them. Incapacity excuses from suing, and incapacities arise from the different sources mentioned in the acts. If, then, one disability excuses from not suing as much as all would, and all disabilities are precisely alike, it would follow that if any of these disabilities existed at the time when the action accrued, the person laboring under them should be excused for not suing whilst any of them continue. If there is no disability at the time the action accrues, the statute of limitations will not be suspended by any intervening one, because at the time the action accrued the person was a free agent and might have commenced one. I am aware that by taking the disabilities mentioned in our act in detail, and considering them as distinct provisions, by a strict grammatical construction, we may arrive at different results, because, strictly speaking, no particular disability creates an incapacity unless it ex- (610) isted at the time the action accrued. But this construction, in my opinion, goes round the spirit of the act, and is an example of the maxim *Qui hæret in litera, hæret in cortice.* As far as I can learn, the construction I have given it is the one that has been heretofore put upon it. I, therefore, think judgment should be entered for the plaintiff.

TAYLOR, C. J. The plaintiff Mary Davis attained her full age on 1 January, 1808, at which time she was under coverture, and it is contended on behalf of the defendant that she was bound to sue within three years from that period, as the proviso of the act extends only to that disability which existed when the cause of action accrued.

It has been taken for granted in the argument, that on the authority of adjudged cases, if Mary was obliged to sue within three years after her coming of age, and the statute has barred her right, it operates also to bar the right of the coplaintiff, who was and still continues under disability. It is not necessary for me to express any opinion on the very novel question of law which the peculiar facts of this case present, nor should I be willing to do so without argument and consideration. But I would remark in passing that in all the cases wherein it has been held that the right of those coplaintiffs who are under disability is barred by the neglect to sue within due time, of those who were of ability there was one or more of the plaintiffs free from all the incapacities enumerated in the statute. And *Perry v. Jackson,* in 4 Term, 519, was decided on the reasoning that the proviso was introduced into the statute in order to protect the interests of those persons which there was no one of *competent age,* of *competent understanding,* or competent in *point of residence,* to protect. The words of the proviso are: (611) "If any *person or persons* that is or shall be entitled to any such action, etc., be or shall be, at the time of any such, given or accrued, fallen or come within the age of 21 years, then such person or persons shall be at liberty to bring the same actions so as they bring the same within such times as are before limited after their coming of full age, etc." The grammatical construction of this clause, it has been properly remarked by the Court, extends only to cases where the person individually, a single plaintiff, or persons in the plural when there are several plaintiffs, are not in a situation to protect their interests. In that case one or more of the partners was resident in England and free from all disability. In *Riden v. Frion,* 7 N. C., 577, two of the plaintiffs were of full age. And in no case has it occurred that all the plaintiffs were under disability when the cause of action accrued, and continued so till its commencement. In the absence of express authority, I should pause before I pronounced the right of the plaintiff Keturah defeated by the neglect of her sister Mary, who never has been *sui juris* since the cause of action accrued.

It is contended on the part of the defendant that, as the cause of action accrued when Mary was a minor, she was bound to sue within three years after arriving at the age of 21 years, whereas a period of eleven years beyond that time had elapsed, and that the disability of coverture having supervened to that of infancy, does not give her three years after the dissolution of the coverture; that the exceptions in the proviso are to be referred respectively to that disability which existed at the time the cause of action accrued, and do not extend to any occurring afterwards. In support of this objection several cases have been read which tend strongly to show that is the true construction of the act; and though it may be discovered upon an attentive and critical examination of it, it is not the obvious one. On the contrary, the general if not universal impression in this State has been that the act de- (612) signed to protect the rights of those whom the law deemed incapable of taking care of them themselves, and that an infant becoming covert during her infancy was as much an object of the law as a *feme covert,* on whom a right devolved during her coverture.

I am satisfied, from an attentive examination of the act of 1715, that this is not its true and grammatical construction, but that, according to its terms, the infant must bring the action within three years after his or her coming of full age, although he or she shall be *covert, non compos,* imprisoned or beyond sea before that period arrived; that the *non compos* should bring his action within three years after he became of sound mind, although during his infirmity he became imprisoned, and so on as to the other exceptions. The act, however, has received a different construction, occasioned, perhaps, by its never having undergone a rigid scrutiny, but more probably from the privileges and immunities possessed by persons at the common law, who labored under these several disabilities, which, by general acceptance, have been transferred to the interpretation of the act.

At the common law no laches were accounted in infants and *feme coverts* for not making a claim or entry to avoid descents; and in discussing this subject Littleton states "that if husband and wife, as in right of the wife, have title and right to enter into lands which another hath in fee or in fee tail, and such tenant dieth seized, etc., in such case the entry of the husband is taken away upon the heir which is in by descent. But if the husband die, then the wife may well enter upon the issue which is in descent, for that no laches of the husband shall turn the wife or her heirs to any prejudice or loss in such case, but that the wife and her heirs may well enter where such descent is eschewed during coverture." Littleton, sec. 403. In his commentary on this section Lord Coke, after stating that the law would be different if a *feme sole* were disseized of lands and then take husband, proceeds thus: "But if the woman were within age at the time of her taking (613) husband, then the dying seized shall not, after the decease of her husband, take away her entry; because no folly can be accounted in her, for that she was within age when she took husband, and after coverture she cannot enter without her husband; all which is implied in the, etc." Co. Litt., 246a.

This construction of the case of cumulative disabilities, thus clearly stated by Lord Coke, has by long acquiescence attached itself to the act of limitations, and cannot directly be changed by any authority less than that of the Legislature. The opinion has been general, if not universal, in this State for the last thirty years that such is the meaning of the act; and it is not from matter decided only where the point has been raised upon argument, but also from the long-continued practice of the courts, without objection taken, that the rules of law are collected. 15 East, 225. I, therefore, think the judgment should be affirmed.

HENDERSON, J., being of this opinion, also.

PER CURIAM. Affirmed.

Cited: *Caldwell v. Black,* 27 N. C., 472; *Williams v. Lanier,* 44 N. C., 37; *Davis v. Perry,* 89 N. C., 422.

STATE v. THOMPSON.

The Attorney-General has a discretionary power to enter a *nolle prosequi,* for the proper exercise of which he is responsible; the Court will not interfere unless the power be oppressively used. After entering a *nol. pros.,* when a cause is called for trial, he may issue a *capias* returnable to the next term upon the same indictment.

THE defendant was indicted for permitting his negro slave to hire his own time, and when the cause was regularly called for trial before *Norwood, J.,* at WAKE, the defendant was ready and urged for a trial. The Attorney-General directed a *nolle prosequi* to be entered in the (614) case without assigning any reason therefor; and after the *nol. pros.* was entered the Attorney-General moved for a *capias* against the defendant, returnable to the next term of this Court, which was refused by the court, whereupon the Attorney-General appealed.

TAYLOR, C. J. It seems from the authorities cited that the Attorney-General has a discretionary power to enter a *nolle prosequi,* for the proper exercise of which he is responsible. We know of no case where the Court has interfered with the exercise of this power, though they certainly would do so if it were oppressively used. As to the directing another *capias* to issue, returnable to the next term, the authorities assert that such process may be awarded upon the same indictment. 6 Mod., 261; Com. Dig., "Indictment R."; 1 Chitty C. L., 480. We, therefore, think that it should have been directed in this case.

PER CURIAM. Reversed.

Cited: *S. v. Thornton,* 35 N. C., 258; *S. v. Williams,* 151 N. C., 661.

STATE v. ALLEN, A NEGRO SLAVE.

1. The county courts alone can take original cognizance of a common-law grand larceny committed by a slave.
2. If, therefore, a slave who has once had his clergy be indicted in the Superior Court for a grand larceny at common law, the indictment should state that it was the second offense, so as to incur the punishment of death, and that the court might see upon the record that it had jurisdiction.

AT the Spring Term last of WAYNE, *Badger, J.*, the prisoner was indicted at common law for a grand larceny in stealing a steer, and was thereof found guilty by the jury. After his conviction, the prisoner, being brought to the bar for judgment, prayed the benefit of his clergy. Upon which Mr. Solicitor Miller, by a counterplea to (615) this prayer of clergy, showed a conviction before had of grand larceny by the prisoner, and demanded judgment of death against him. The caption of the record of the former conviction recited in the counterplea was in these words: "At a Superior Court of law, holden for the county of Greene on the second Monday after the fourth Monday of March, in the year 1822, by and before the Honorable Joseph J. Daniel, esquire, judge of the said court." The indictment set forth in the counterplea was as follows: "The jurors for the State, upon their oath, present that Allen Woodard, late of the county of Greene, on the 1st day of March in the year of our Lord 1822, about the hour of 11 of the night of the same day, with force and arms, at and in the county aforesaid, the dwelling-house of one Asa Daniel there situate feloniously and burglariously did break and enter with intent the goods and chattels of the said Asa Daniel in the said dwelling-house then and there being, then and there feloniously and burglariously to steal, take and carry away, and then and there in the same dwelling-house, with force and arms, twenty pieces of bacon, of the value of 40 shillings, of the goods and chattels of the said Asa Daniel, in the same dwelling-house then and there being found, then and there feloniously and burglariously did steal, take and carry away, against the peace and dignity of the State." The record as recited then stated the arraignment and trial in these words: "On Thursday, 11 April, 1822, the prisoner, Allen Woodard, a colored man, was arraigned at the bar, and upon his arraignment pleaded not guilty. Whereupon the following jury were sworn and charged, viz.: (naming them). The jury find the prisoner at the bar not guilty of the felony and burglary wherewith he stands charged, but guilty of grand larceny." The record then showed the prayer of clergy by the prisoner, its allowance by the court, and a judg- (616)

ment of public whipping (instead of burning in the hand), according to the act of Assembly of 1816 for that purpose made. The counterplea then averred the identity of the prisoner Allen and the said Allen Woodard, and prayed judgment.

The solicitor then produced in the court below the record of conviction alleged in his counterplea, and proved the averments of fact, which are also admitted by the prisoner, and moved for judgment.

The presiding judge refused to pronounce any judgment against the prisoner, ordered the judgment to be arrested and the prisoner to be discharged; whereupon the solicitor appealed to this Court.

TAYLOR, C. J. The principal question in this case, whether the Superior Courts have jurisdiction of the offense charged against the prisoner, was decided at the last term, in *S. v. Adams. ante* 188, and it was then considered that the county court alone could take original cognizance of the offense. If the slave is charged with the second offense, so as to incur the punishment of death under the act, it ought to be so stated in the indictment, that it might appear on the face of the record that the court had jurisdiction. At present the indictment discloses a criminal charge, which is confined expressly to the county courts. The judgment must be

PER CURIAM. Affirmed.

(617)

STATE v. DANIEL, CRESE, AND PIETY, NEGRO SLAVES.

When slaves are charged with a simple grand larceny at the common law, to give the Superior Courts jurisdiction it should be stated in the indictment that it is the second offense, because otherwise it is not punishable with *death*.

AT Spring Term last of WAYNE, before *Badger, J.,* the prisoners, three negro slaves, were indicted by the grand jury for a simple grand larceny at common law in stealing a steer. The prisoners being put to the bar for their arraignment, and the indictment being read to them, it was stated and admitted by the solicitor that neither of the prisoners had before been admitted to the benefit of clergy, or been convicted of any felony.

The presiding judge being of opinion that the offense charged in the indictment was not within the act of Assembly giving the Superior Courts jurisdiction of offenses committed by slaves, as the punishment could not, upon conviction, extend to life, refused to put the prisoners to answer the charge, and ordered the indictment to be quashed. Whereupon Mr. Solicitor Miller, for the State, appealed to this Court.

TAYLOR, C. J. It is only upon a second conviction of the offense stated in the indictment that the punishment of death is annexed to it; and it is consequently triable in the county court according to the act of 1793, ch. 381. The Superior Courts obtain jurisdiction under the act of 1816 only where the offense is so charged as to appear upon the face of the indictment to be punishable with death. It would be vain to try the prisoner first, and then to consider whether he was liable to punishment. This was settled in *S. v. Adam, ante,* 188. The court acted correctly in refusing to put the prisoners to answer (618) the charge.

PER CURIAM. Affirmed.

STATE v. ROUT.—From Buncombe.

In an indictment for stealing a bank note, a description of the note in the following words, "one $20 bank note on the State Bank of North Carolina, of the value of $20," is good.

INDICTMENT for grand larceny, charging the defendant with having stolen "one $20 bank note on the State Bank of North Carolina, of the value of $20, of the goods and chattels of one," etc., and the only question before this Court was as to the sufficiency of the description of the note in the bill of indictment. The case stood here upon the appeal of Mr. Solicitor Wilson, for the State, from the judgment pronounced below for the defendant.

TAYLOR, C. J. In the description of the thing stolen, in an indictment for larceny, so much is certainly essential as will enable the jury to decide whether the chattel proved to have been stolen is the very same with that upon which the indictment is founded and will give to the court judicial knowledge that it could have been the subject of the offense charged, to the end that the defendant may be protected from a subsequent prosecution for the same cause. Upon the first ground the jury can have no difficulty, from the description in this indictment to form an opinion whether the bill actually stolen is the same the prisoner is charged with stealing. The other inquiry depends upon the act of the Assembly creating the offense, which makes it felony to steal "any bank note, check, or order for the payment of money issued by or drawn on any bank or other society or corporation within this (619) State or within any of the United States." 1811, ch. 814. If, therefore, it appears on the face of the indictment to be a note of the State Bank, it comes within the very words of the act, and is conformable to approved precedents for a similar offense under the statute upon which this act is framed: for under the statute of Geo. II., which makes stealing choses in action felony, it has been uniformly held that an indictment for stealing bank notes is good if it merely describes them as such, without setting them forth. Thus it has been holden sufficient to allege that the defendant "stole divers, to wit, nine bank notes for the payment of divers sums of money, in the whole amounting to a large sum of money, to wit, the sum of........ of lawful money, and of the value of........" without even stating the value of any individual note. 2 Leach, 1103. A note on the State Bank is as intelligible as a note issued by the bank, and would be understood in common acceptation in the same sense, for it is a familiar mode of speech to say "a note on or upon a man," and is understood as a note drawn by a man. Nor was it necessary to allege that it was a note on or issued by "the president and directors," for though that is the corporate name of the bank by which alone they can sue or be sued, yet it is called in the act creating it "the State Bank," and by that name restrictions are imposed upon it. Section 14. A difference is taken in the authorities where a corporation is party to a suit, and where it is only referred to in a suit in which it is not a party. In the former case it must be exactly described by its corporate name; in the latter it is sufficient to describe it in such a manner as to identify the corporation. 1 Kyd on Corp., 227; Bac. Ab., "Corporation, C.," 25.

A more general description of the note stolen than the one contained in this indictment has been repeatedly held good. The charge was for stealing from the person of A. "one bank note of the value of $10, of the goods and chattels of the said A." Exceptions were taken (620) to this description, which were overruled, the court holding that a bank note was by necessary implication a note for the payment of money, and that generally a person from whom a note is stolen is incapable of giving a very particular description of it. 1 Mass., 336. In 3 Bos. & Pull., 145, a case is cited by one of the judges in which a man was indicted for stealing a 5*l.* note, without adding any further description of the note, the person from whom it was stolen not recollecting the tenor of the note; and, the point being reserved for the opinions of the judges, they held the indictment sufficient. I am, therefore, of opinion that the judgment rendered in this case was erroneous, and must be reversed.

HALL and HENDERSON, JJ., assenting.

PER CURIAM. Reversed.

Cited: *S. v. Boon*, 49 N. C., 466; *S. v. Fulford*, 61 N. C., 563; *S. v. Bishop*, 98 N. C., 776.

STATE v. SIMPSON.—From Carteret.

The act of 1811 concerning the use of false tokens or pretenses requires that the cheat should be accomplished by means of some token or false *contrivance* calculated to impose on the credulity of ordinary men. A mere lie was not in the contemplation of the legislature.

INDICTMENT in the following words, viz.:

"The jurors for the State, upon their oath, present that Absalom Simpson, late of the county of Carteret and State of North Carolina, on the 6th day of June, in the year 1824, with force and arms, in the county and State aforesaid, unlawfully, knowingly, and designedly did falsely pretend to one Mitchell W. Piner that the said Absalom wished to see a certain judgment which he, the said Mitchell, had obtained against him, the said Absalom, before George Gillikin, Esquire, one of the justices of the peace for the county of Carteret, and that he, the said Absalom, wished to see said judgment for the purpose of ascertaining the amount due thereon, and for the purpose of paying the same to the said Mitchell, by which said false pretenses he, the said Absalom, then and there, to wit, on the said 6th day of June, in the year 1824, at the county and State aforesaid, unlawfully, knowingly, (621) and designedly did obtain from the said Mitchell the judgment aforesaid, of the value of 1 pound 10 shillings, of the goods and chattels of said Mitchell, with an intent then and there to cheat and defraud him, the said Mitchell; whereas in truth and in fact he, the said Absalom, did not wish to ascertain the amount due on said judgment, and whereas in truth and in fact the said Absalom did not wish and intend to pay the amount so due to said Mitchell on said judgment, to the great damage and deception of said Mitchell, to the evil example of all others in like case of offending, against the form of the statute in such case made and provided, and against the peace and dignity of the State."

The case stood before this Court on the appeal of the State from the judgment below for the defendant.

Badger for defendant.

HENDERSON, J. I concur with the judge of the Superior Court that there should be judgment for the defendant; for whatever may have been the construction of the statute of George II in relation to false pretense (and I think even that statute would not extend to this case), our own statute under which this defendant is indicted requires that the cheat should have been effected by means of some false *contrivance*, calculated to impose upon the credulity of ordinary men, (622) for if a cheat practiced by a bare and naked lie was designated to be brought within the statute, why insert in the specifications false writings, tokens, etc., or why insert any specifications at all? The words "any pretense whatever" must, therefore, mean pretense of the like kind, something more than a naked lie, something of the same family with those specified. To read the statute otherwise would be making the Legislature insert the specifications for no purpose, or something more to no purpose, to wit, to puzzle and perplex.

The general words were enacted from a consciousness of an inability to enumerate every device which the knavery and ingenuity of man might devise. All such as were of the kind enumerated were intended to be included, and none other. It is not good policy to call in the aid of the criminal law whenever a person has received an injury, one which common prudence might have guarded against.

The CHIEF JUSTICE and Judge HALL assented.

PER CURIAM. Affirmed.

Cited: S. v. Boon, 49 N. C., 467; *S. v. Phifer*, 65 N. C., 323; *S. v. Daniel,* 114 N. C., 825.

(623)

STATE v. PETTAWAY.

1. Under the act of 1741, ch. 30, a man may be charged with the maintenance of a bastard child begotten on the body of a married woman, upon proof of the nonaccess of her husband. The wife is not a competent witness to prove nonaccess; she may, however, from necessity, be examined to prove her criminal intercourse with another.
2. If by reason of imbecility, or on any personal account or by reason of absence from the place where the wife was, the husband cannot be the father of his wife's child, it shall be adjudged a bastard.

THE defendant was charged with being the father of a bastard child. begotten on the body of one Avy Perry, and pleaded thereto that he was not the father, and that Avy Perry was a married woman. The warrant for his apprehension issued 13 March, 1824.

On trial before *Norwood, J.,* at EDGECOMBE, the jury found a special verdict as follows: "That the defendant is the father of the child; that the husband of Avy Perry has not been absent seven years next before 13 March, 1824, but has been absent from the State of North Carolina six years ten months; that he was heard of in the State of Tennessee in 1820 and in the State of Georgia in 1821."

The presiding judge was of opinion that the law was in favor of the defendant on this finding, and ordered the proceedings to be dismissed, whereupon the Attorney-General for the State appealed.

TAYLOR, C. J. There are two objections made by the defendant to his being charged with the maintenance of the child sworn against him. The first is that the mother is a married woman and that the power of the justices and the county court is confined by the ex- (624) press terms of Laws 1741, ch. 30, sec. 10, to the case of a single woman being pregnant or delivered. The other is that the access of the husband shall be presumed, unless he was beyond sea so long a period before and during gestation as to render it impossible that he should have been the father.

It will appear from an accurate examination of the law that the first objection is untenable; for although it uses the expression, "single woman," in the part of the section making provision where the woman refuses to declare the father, yet in the subsequent part of the same section it proceeds: "But in case such woman shall, upon oath, before the said justices, accuse any man of being the father of a bastard child," etc., expressions which comprehend every woman, married and single, who shall have a child born under such circumstances that the law would adjudge it to be a bastard. If a married woman have a child born by an adulterous intercourse, in violation of the rights of matrimony, the nuptial state of the woman does not prevent the law from pronouncing the child a bastard. The mother having a child under such circumstances is, in the sense of the act, a single woman; for, the bastardy of the child being established, it follows as a necessary consequence that it was born out of lawful matrimony, and our act employs the same terms with the Statute 6 Geo. II., which was passed a few years before it, under which statute convictions have been repeatedly had upon proof of the nonaccess of the husband. *Rex v. Bedall,* 2 Strange, 1076; *Rex v. Reading,* Andr., 10. In those cases the objection was not even taken, and in *Rex v. Luffe,* 8 East, 196, where it was taken, it was overruled without hesitation.

The other objection is founded upon the old rule of the common law, that if the husband was within the four seas, that is, within the jurisdiction of England, no proof of nonaccess to his wife was admissible, but the child was deemed to be his. But this notion, entirely destitute of any rational foundation, has been long since ex- (625) ploded, and it is now held that if, by reason of imbecility or on any personal account, or from absence from the place where the wife was, the husband could not be the father of the child, it shall be adjudged a bastard. This position is so plainly shown by the authorities cited in the argument that it is needless to dwell upon it. It is also equally well established that the wife is not a competent witness to prove the nonaccess of her husband, upon principles of public policy, which will not allow her to give evidence against the husband in cases affecting his interest or character, except in cases of necessity. As to her criminal intercourse with another, she may be examined, because a fact so secret in its nature can scarcely ever be proved by other evidence. To this fact alone the woman certified, so far as the record speaks; the jury have found the nonaccess, but there is no ground to presume that the verdict was in this respect founded on the evidence of the woman. Every fact is proved to warrant the application of the law that the defendant be adjudged the reputed father and charged with the maintenance of the child as the county court shall order; to which end a *procedendo* must issue to that court.

PER CURIAM. Reversed.

Cited: *S. v. Allison,* 61 N. C., 346; *Boykin v. Boykin,* 70 N. C., 265; *S. v. McDowell,* 101 N. C., 736; *S. v. Peeples,* 108 N. C., 769; *S. v. Liles,* 134 N. C., 742; *Ewell v. Ewell,* 163 N. C., 236.

IN EQUITY.

(626)

BOYD AND OTHERS v. CARSON.—From Mecklenburg.

THE bill stated that the complainants had agreed to purchase a store of goods belonging to the defendant, and that the contract between the parties was that defendant should make a correct inventory of the goods, with their then value agreeably to his then selling price, from which defendant was to deduct 45 per cent, and the sum remaining was the price which complainants were to pay. The bill then stated that the amount of the goods was $4,351.68, and that a deduction of 45 per cent would leave $2,394.13, but that, owing to some error in calculation, complainants gave to defendant a bond for $3,046.18; that they afterwards discovered their error on an inspection of the calculation of Carson; that Carson refused to correct it, and had sued them on the bond, and they prayed an injunction, etc.

The defendant answered that the contract was that he would sell his store of goods to complainants at costs and charges, and in order to ascertain the costs and charges it was agreed that an invoice should be taken at the retail prices, from which was to be deducted 50 per cent, the advance put upon them by defendant, or, in other words, the retail prices; that then to the sum so remaining, after taking off the advance, was to be added 5 per cent to cover costs and charges; that, according to the calculation made as agreed on, the sum due was $3,046.18, for which complainants gave their bond, on which they have since made large payments; that at the time of giving it they pretended that the calculation was erroneous, but on having it explained to them they acknowledged its correctness.

Defendant, further answering, admitted that in the agreement (627) 50 per cent was spoken of as the deduction to be made, but that was the 50 per cent added to the invoice price, which in fact was a discount of 33⅓ per cent.

The matter of account was referred to the clerk and master of this Court, who reported that, according to the contract, the goods were to be estimated at the retail prices—in other words, at an advance of 50 per cent; that a discount of 45 per cent was then to be made, leaving thereby 5 per cent on prime cost to cover costs and charges. The result would be as follows:

Amount according to retail prices	$4,351.68
Deducting the advance, 50 per cent, say one-third	1,450.56
Prime cost	$2,901.12
Add 5 per cent	145.05
Leaves the sum of	$3,046.17

If it is to be understood that $45 in each hundred of the amount of the retail prices is to be deducted, then the result is as follows:

Amount of retail prices	$4,351.68
Deduct $45 from each hundred	1,958.24
Leaving	$2,393.44

By this calculation (if 50 per cent was the advance) the defendant, instead of getting 5 per cent for costs and charges, does not get the prime cost of the goods.

PER CURIAM. The view of this case, taken in the first calculation of the master's report, is supported by the evidence in the cause, and corresponds to the contract of the parties. Therefore, dissolve the injunction with costs.

(628)

PRATER v. MILLER.—From Rutherford.

1. A court of equity can afford no relief on a contract or agreement which is uncertain. By this is meant, however, uncertain in its *terms;* for when an agreement to do a thing, either in itself or by reference to any other rule, furnishes the means of ascertaining the thing, or if the thing be not *now* certain, or capable of certainty, yet if a rule be given by which it may hereafter be rendered certain, equity will interfere.
2. Equity is not obliged to decree a specific performance wherever damages might be recovered at law, but will judge from all the circumstances whether the agreement is such as ought, in justice to both parties, to be carried into effect. Where, therefore, an agreement is made between A. and B. for the purchase of a large tract of land, a title to be made when B., the purchaser, pays for it, and B. goes into possession and continues for ten or twelve years, and in all that time pays but a very insignificant part of the purchase money, equity will not compel A. to convey to B. a portion of the land equal in value to the money paid by him, especially when laying off this portion of the land must materially impair the value of the residue of the tract. B., the purchaser, is entitled in equity to have the money which he has paid refunded, and is not chargeable with the rents and profits while in possession, because by the agreement he was to take possession and plant and build; but he is justly chargeable with interest on the purchase money.

THE bill set forth that about ten years prior to the filing thereof the complainant contracted with the defendant for the purchase of a tract of land at the price of $2 per acre, to be conveyed when the complainant should pay for the same. At the time of the contract it was agreed between the parties that the complainant should take so much of the land as he might afterwards find he had the ability to pay for, and complainant went into possession of the tract, and clearing about 30 acres, improved the same with buildings, an orchard, etc. The complainant further stated that, being a blacksmith, he had for a period of eight years done work for the defendant, the value of which was about $130 and that he also rendered services to the defendant on his (629) farm to the value of $33; that for these services he had never demanded payment of the defendant, always expecting that the sum due him would be retained by the defendant in part payment of the purchase money of the land. The bill then proceeded to state that after complainant had lived some time on the land the defendant commenced suit against him by action of ejectment, obtained judgment, and was about to issue a writ of possession. The bill concluded with a prayer for an injunction, and a general prayer for relief.

Seawell moved to dismiss the bill.

TAYLOR, C. J. I am unwilling to dismiss this bill, because I think it states a strong ground of equity, and whatever uncertainty there is as to the number of acres, or the amount of the plaintiff's account, may be reduced to a certainty by a survey and by a reference to the clerk. It is a circumstance entitled to weight that the plaintiff has been allowed to remain in possession for so great a length of time, and to make improvements. The bill is not drawn with sufficient precision, but I think it should go to a hearing.

And of this opinion were the rest of the Court; and now on the hearing:

Seawell for defendant. (630)
Badger for complainant.

The Court here informed the counsel they were satisfied that (631) the objections taken by the defendant's counsel were answered, and the agreement sufficiently certain; but that another objection presented itself to the Court. Upon the proofs it appears that only 18 acres out of a tract of 500 have been paid for. As a performance this seems illusory, and the Court will not decree specific performance as to these 18 acres, because it cannot be supposed that the defendant intended to sell so small a portion of that tract, but he must have contemplated a sale of some part of his land bearing a greater proportion to the whole, and ought not to be obliged to dismember the tract for the sake of selling 18 acres at $2 per acre.

Badger then contended the complainant was entitled to a decree for the repayment of purchase money advanced.

PER CURIAM. The question made by the bill and answer is (633) whether there was an agreement to sell the land, or so much thereof as the plaintiff should be able to pay for, or whether the plaintiff was put into possession and allowed to go on and improve the land in consideration of his doing the defendant's blacksmith's work.

The contract of sale, according to the plaintiff's statement, is so fully proved by five witnesses that there could be no hesitation in decreeing a specific performance if the price had been paid. The objection to the uncertainty of the agreement cannot prevail, for though it did not stipulate for any precise number of acres, yet being an executory agreement, the completion of which was referred to a (634) future act, whenever that was ascertained, viz., the ability of the party to pay, the contract became certain. A lease of land, without mentioning any term, is void for uncertainty; but a lease for so many years as J. S. should name would be good. 2 Vern., 684; Hob., 174. Whatever number of acres the plaintiff should be able to pay for, and did pay for, or tender the payment, the defendant was bound to make a title for, and the Court, in a case unattended by other circumstances, would decree a specific execution for.

But there are insuperable objections to such a decree in this case, for the plaintiff, after a possession of ten or twelve years, enjoying the rents and profits, has paid but the sum of $71, which, with the charge of interest against him, would reduce the quantity of land he might claim to 18 or 20 acres. And if this were laid off so as to include his improvements, it would detach 90 acres from the tract, thereby doing to the defendant more injury than any damages which the plaintiff could recover at law. When the defendant made the agreement he must have calculated upon something like a substantial purchase on the part of the plaintiff, upon the payment for a quantity that would bear a due proportion to the whole tract, and it is incredible that he should have considered himself as incurring an obligation compelling him to convey an insignificant part of the tract, so laid off as greatly to impair the value of another considerable portion. From an inspection of the plat it seems probable that 110 acres which projects from the tract, and on the nearest part of which the plaintiff has settled, was the portion within the contemplation of the parties, for that might be laid off without destroying the unity of the tract.

This Court is not obliged to decree a specific performance, although damages might be recovered at law, but will judge from all the circumstances whether it is such an agreement as ought to be carried into effect, for it would be hard to carry an agreement into (635) execution in equity when it would be greatly to the prejudice of the party against whom it should be decreed, if a jury upon inquiry should find but very small damages. And the circumstances of this case would probably lead to such a result. It would not be right to charge the plaintiff with the rents and profits while he was in possession, for it seems to have been a part of the agreement that he should take possession and plant and build; but he is justly chargeable with interest on the purchase money. 2 Atk., 490; 3 Atk., 673; 12 Ves., 26.

The decree must be that the plaintiff recover the balance, with interest from the time the defendant obtained possession, at which period the defendant should have refunded the money paid, as he had put an end to the contract. Each party to pay his own costs at law and in equity.

Cited: Herren v. Rich, 95 N. C., 502.

INDEX

ACCORD AND SATISFACTION.

1. If an obligor pays a *less* sum than is due, either before the day specified or at another place than is limited by the condition, and the obligee receive it, this is a good satisfaction. *Smith v. Brown*, 580.

2. Accord and satisfaction made before a breach of covenant cannot be pleaded in bar of an action on the covenant; but when any damage has accrued under the deed the accord may be pleaded in discharge of such damage. *Ibid.*

ACTION ON THE CASE.

When a slave is hired, and is killed during the period for which he was hired, *case* for damages against the person killing is the proper remedy for the owner. *Hilliard v. Dortch*, 246.

AGENT.

Where a writ was issued in the name of A. as plaintiff, and at the time of the issuing of it A. indorsed thereon that the suit was brought to the use of B., it was *Held*, that A. thereby made B. his agent to receive and collect the amount of the debt sued for, and gave notice of such agency to the world, and that consequently A. was bound by the act of his agent within the authority given him; that the authority here was to receive to his own use, and not as a mere collector, and, therefore, that B. might receive anything which he thought proper in the discharge of the debt. *Clark v. Shields*, 461.

AMENDMENT.

The omission in the writ of the name of a party plaintiff may be amended on seasonable application to the court below; but the Supreme Court has no power to amend in such case. *Wilcox v. Hawkins*, 84.

APPEAL.

1. An appeal to the Supreme Court from an interlocutory judgment will be dismissed. *Medford v. Harrell*, 41; *Latham v. Bowen*, 418.

2. An act done by the Superior Court in the exercise of legal discretion is not the subject of appeal to the Supreme Court. *S. v. Lamon*, 175.

ASSUMPSIT.

Assumpsit will not lie on a judgment rendered by a justice of the peace. *Bain v. Hunt*, 572.

ATTORNEY.

1. A county attorney is not entitled to have a fee taxed for his benefit on a *scire facias* issued to a guardian under the act of 1820. *Randolph v. Johnson*, 238.

2. Foreigners not naturalized cannot be licensed as attorneys in North Carolina. *Ex Parte Thompson*, 355.

ATTORNEY—*Continued.*

3. An attorney at law is not entitled to a commission of 5 per cent on the amount of a bond placed in his hands for collection when the money is paid into the clerk's office and the plaintiff applies in person for it. *Leach v. Strange,* 601.

AUCTIONEER.

When an act of Assembly gives to an auctioneer an exclusive right of selling goods at auction, except in particular cases, the law, independent of any contract between the parties, imposes on the auctioneer as an official duty that he shall pay over to his employer the proceeds of the sale; and, therefore, it was *Held,* that the auctioneer and his securities were liable on the auctioneer's official bond, when he had failed to pay over to his employer, for a breach of that part of the condition which bound the auctioneer to do and permit all and whatsoever *the law required. Comrs. v. Holloway,* 234.

BAIL, *Vide* Record, 4; Sheriff, 7; Honest Debtors, 1.

BANK NOTES.

1. For many purposes bank notes are to be considered as *money.* They are so considered in an action for money had and received, where the plaintiff has received a counterfeit bank note in exchange for genuine bank notes. *Anderson v. Hawkins,* 568.
2. A payment in a counterfeit bank note is a nullity, and plaintiff may recover back the amount. *Ibid.*
3. An indorsement on a bank note, of itself, signifies nothing in the way of contract. *Ibid.*

Vide Sheriff, 11; Indictment, 9.

BASTARDY.

1. Under the act of 1741, ch. 30, a man may be charged with the maintenance of a bastard child begotten on the body of a married woman, upon proof of the nonaccess of her husband. The wife is not a competent withness to prove nonaccess; she may, however, from necessity, be examined to prove her criminal intercourse with another. *S. v. Pettaway,* 623.
2. If by reason of imbecility, or on any personal account, or by reason of absence from the place where the wife was, the husband cannot be the father of his wife's child, it shall be adjudged a bastard. *Ibid.*

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Days of grace are not to be allowed as between the original parties to a single bill, notwithstanding such paper is made negotiable by statute. *Jarvis v. McMain,* 10.
2. The rule that notice to a distant indorser should be sent to the postoffice *nearest* to his residence was founded on the presumption that the information would most speedily be given in such way. But the rule is subject to modification; and the inquiry is, Was the notice directed to that postoffice which was most likely to impart to the indorser the earliest intelligence, though it may not be the nearest? If it was, it is sufficient. *Bank v. Lane,* 453.

BILLS OF EXCHANGE—*Continued.*

3. The payment of negotiable instruments should not be dependent on a contingency. *Goodloe v. Taylor*, 458.
4. Where a note was drawn as follows: "Against the 25th of December, 1819, or when the house John Mayfield has undertaken to build for me is completed, I promise to pay," etc. It was *Held*, that the parties by inserting a specific date of payment had made it payable at all events, whether the house was completed or not, and that consequently the note was negotiable. *Ibid.*
5. A sealed note is not entitled to days of grace as between indorsee and indorser. *Fields v. Mallett*, 465.
6. When the maker of such a note was a physician, having a shop and a dwelling-house in different parts of the town, and when the note became due the indorser informed the holder that the maker was 50 miles out of town, and would pay on his return; it was *Held*, that under such circumstances an application at the shop was all that the law required, and that an application at the dwelling-house of the maker was unnecessary. *Ibid.*

BOUNDARY.

1. A line calls for "171 poles to Roanoke River." The call to the river terminates when the line reaches the *margin or bank* of the river, without regard to distance, and the intersection of the line with the river is the point from which the next line commences. *Haughton v. Rascoe*, 21.
2. Lines and courses are described: "North 12 east 530 poles, then along the thoroughfare," etc. The line north 12 east shall run to the thoroughfare, without regard to course and distance. *Ibid.*
3. In questions of boundary, marked lines of trees are more certain than course and distance, and, therefore, shall control them. Accordingly, when there has been a long and continued possession up to lines variant from those called for in the grant, and it appears that such lines were recognized as the true lines of the grant by several adjoining patents, these are facts which point to something controlling the courses and distances of the grant, and should, therefore, be submitted to the jury to draw from them such inferences as they may think proper; for boundary is matter of *fact*. *McNeill v. Massey*, 91.

BRIDGE.

One who builds a private bridge over a private way for his own emolument or convenience is not indictable should the bridge get out of repair, notwithstanding it may be generally used by the public. *S. v. Seawell*, 193.

CASE. *Vide* Action on the Case.

CERTIORARI.

When the condition of a bond given upon obtaining *a certiorari* was that the obligor should make his personal appearance and *abide by and stand to* the judgment of the court, it was *Held*, that these words were equivalent to the words *perform* the judgment of the court, and imposed on the obligor the payment of the sum recovered against him. *Molton v. Hooks*, 342.

CHEAT.

The act of 1811, concerning the use of false tokens or pretenses, requires that the cheat should be accomplished by means of some token or *false contrivance* calculated to impose on the credulity of ordinary men. A mere lie was not in the contemplation of the Legislature. *S. v. Simpson*, 620.

CHOSE IN ACTION.

When A. turned cattle into the woods, and B., thinking one of them his, took possession of it, after which A., ignorant of B.'s possession, sold it to C., who was also ignorant of it, it was *Held*, that C. might in his own name sue B.; the possession which he had at the time of the sale could not be deemed adverse. *Morgan v. Bradley*, 559.

COLOR OF TITLE.

Color of title may be defined to be a *writing* upon its face *professing* to pass title, but which does not do it, either from a want of title in the person making it or the defective mode of conveyance which is used; and it would seem that it must not be so obviously defective that no man of ordinary capacity could be misled by it. *Tate v. Southard*, 119.

CONSIDERATION.

The consideration which is necessary to support a promise on which an action may be brought must yield a benefit to the party promising, or be attended with trouble or prejudice to the other party. Where, therefore, one, by advice honestly given, induces another to purchase a tract of land, and, the purchase being an unfortunate one, the party advising declares that, as he was the cause of the purchase, he will forgive the purchaser a debt due from him, such declaration or promise creates no moral or legal obligation. *Johnson v. Johnson*, 556.

CONSTABLE.

When a constable, having an execution in his hands, receives the money of the defendant therein, it is an *official act*, and not paying it over to the plaintiff is a breach within the penalty of his bond. *Governor v. Bailey*, 463.

CONSTITUTION.

1. The acts enlarging the jurisdiction of justices of the peace do not violate the fourth Article of the Bill of Rights. *Smith v. Campbell*, 590.

CORPORATION.

1. Where an act of the Legislature, incorporating a navigation company, authorizes but does not require the company to strike off the names of subscribers delinquent by the nonpayment of their installments, and to sell their shares, this mode of proceeding is usually given as a cumulative remedy to facilitate the operations of the company, and does not preclude it from bringing suit for the installment due. *Navigation Company v. Neal*, 520.

2. Whenever it appears that a charter has been granted to certain individuals to act as a corporation, who are in the actual possession and enjoyment of the corporate rights granted, they shall be considered

CORPORATION—*Continued.*

rightfully in such possession and enjoyment against wrongdoers and all others who have treated or acted with them in their corporate character; and even if it be shown that the charter was granted on a precedent condition, and persons are found in the quiet possession and enjoyment of the corporate rights as against all but the sovereign, the precedent condition shall be taken as performed. *Ibid.*

3. When by the charter commissioners are directed to ascertain the performance of a condition precedent to incorporation, and they declare it to have been performed, though such declaration be not true, yet shall it be deemed true until the sovereign complains. The usurpation, if there be one, is upon his rights, and his acquiescence is evidence that all things have been rightfully performed. *Ibid.*

COSTS. *Vide* Execution, 1.

COUNTERFEITING. *Vide* Indictment, 6.

COUNTY ATTORNEY. *Vide* Attorney, 1.

DAMAGES.

In suit on a sheriff's voluntary bond a suggestion of damages should be made under the statute of Will. 3, but if not made, it is no good ground of objection after verdict. *Governor v. Witherspoon*, 42.

DAYS OF GRACE. *Vide* Bills of Exchange and Promissory Notes, 1.

DECEIT.

1. In an action for deceit in the sale of an unsound negro, the declaration stated a false affirmation to have been the means by which the plaintiff was induced to make the bargain; and the making of such affirmation with a knowledge of its untruth constituted the *gravamen*, *Held*, that the action was conceived in case, on tort, and the declaration was held good. *Inge v. Bond*, 101.
2. When the purchaser of a slave has, at the time of his purchase, as full knowledge of a defect in the slave as the seller has, no matter how he obtained his knowledge, he cannot afterwards recover for such defect. *Brittain v. Israel*, 222.

DECLARATION.

The want of a declaration, when it appears on the record sent up to the Supreme Court, is an error which the Court cannot overlook, nor can it be amended or remedied but by consent. *Williamson v. Rainey*, 9.

DECREE. *Vide* Equity. 6.

DEED.

When A. conveyed a slave to B., and on the same day B. by writing declared that he "put the said slave into the possession of A., and did give and grant the services of the said slave to A. during her natural life, free from any charge or claim for such services during her natural life," it was *Held*, that they did not operate to convey the *title* to the negro to A., but parted with the possession only without compensation for his services. *Smith v. Hargrave*, 560.

DEPOSITION. *Vide* Evidence, 8.

DESCENT.

The act of 1801, permitting the nearest descendant or relation not
alien to inherit where there are nearer relations who are aliens,
not repealed by the act of 1808, providing a general system of
scents; because the act of 1808 provides a system of descents so f
only as regards the question of consanguinity, and, therefore, leav
untouched the law of alienage. *Rutherford v. Wolfe*, 272.

DEVISE.

1. "I give and bequeath all that I possess, indoors and outdoors": *He*
that these words in a will pass real estate. *Tolar v. Tolar*, 74.

2. "It is my will, and I do allow, that all the remaining part of my esta
both real and personal, be equally divided among the heirs of
brother, John Ford, the heirs of my sister, Nanny Stowe, the heirs
my sister, Sally Ward, deceased, and nephew Levi Ward." The tes
tor in a former clause had taken notice that his brother, John Fo
was *alive*. Levi Ward was one of the children of Sally. *Held*, th
the word heirs was used in the sense of *children*, and as a designati
of the persons the division must be *per capita*. *Stowe v. Ward*, 6

3. The testator's affection for and preference of Levi cannot be shown
parol evidence; but the will furnishing evidence that he was a fav
ite nephew and an object of peculiar bounty, the devise to him
name shall not be considered a repetition of the first, as one of Sal
Ward's children; he shall have an additional share. *Ibid.*

DISTRIBUTION.

Legacies given by testator's will cannot be brought into account in t
distribution of personalty as to which he died intestate. *Wilson*
Hightower, 76.

DOWER.

1. A levy on land was made before the death of the owner; dower w
afterwards allotted to the widow in the land, and afterwards t
sheriff conveyed to the purchaser at his sale. *Held*, that the wid
could not have dower, because the sale related back to the levy
teste of the writ. *Hodges v. McCabe*, 78.

2. A. conveyed by deed of trust his real estate to trustees to satisfy cre
itors, and, continuing in possession, died; but his widow is not en
tled to dower therein. *Taylor v. Parsley*, 125.

EJECTMENT.

1. The general rule of ejectment is that defendant must be proved to
in actual possession, notwithstanding the consent rule; but if a
fendant, in a conversation before suit is brought, admits himself
be in possession, and enters himself a defendant with a view of tryi
the title, upon proof of such admission the action, so far as proof
defendant's possession is necessary, is maintainable. *Mordecai*
Oliver, 479.

2. An action of ejectment was brought against the ancestor, pendi
which he died, and his infant heirs were made parties by *scire faci*
to their guardian, who, in their names, came forward and defend

EJECTMENT—*Continued.*

the suit for the infants, and for their benefit took possession of and received the rents and profits during the pendency of the suit. After a recovery by plaintiff in the ejectment he brought an action for mesne profits against *the infants*, who had never had any possession except that of their guardian before mentioned. *Held*, that plaintiff might sustain the action against them. *Molton v. Mumford*, 483.

3. An action of trespass for mesne profits may be brought against an administrator to recover profits received by the intestate in his lifetime. *Molton v. Mumford*, 490.
4. Laws 1789, ch. 312, "for the more easy redemption of mortgages," applies in those actions of ejectment only where the parties stand in their original simple state of mortgagor and mortgagee. *Devereux v. Marsoratti*, 338.

EQUITY.

1. On a bill filed to correct mistakes in a deed the court will refuse its aid, though the mistakes should be obvious, if the deed was obtained under oppressive circumstances. *Grantham v. Bizzel*, 196.
2. As to the money paid for the land, the bill, in this case, did not offer a reconveyance and pray to have it refunded, and the court therefore held that it could give no relief as to the purchase money. *Ibid.*
3. A bill charged that a husband, before marriage, made to his wife a bond, payable after his death, for £30,000, for the purpose of defrauding creditors, and that the administrator, by contrivance with the widow, was about to confess a judgment thereon before the creditors could sue at law, and prayed an injunction and general relief. The answer admitted the existence of the bond for £30,000 as charged; that suit was brought thereon against the administrator, and denied all design to defraud creditors, and the court sustained the injunction until the hearing. *Holliday v. Porter*, 198.
4. The court, on a bill filed for that purpose, will protect the rights of those who are entitled to slaves after the determination of a life estate, by compelling the owner for life, or those claiming under him, to give bond to abide by and perform the final decree which may be made in the cause. *Coleman v. Coleman*, 200; *Wade v. Parks*, 202.
5. If an obligation and a mortgage be given to secure the payment of money on a bill to foreclose, alleging the loss of the obligation and offering an indemnity, it seems that the loss of the bond *must be proved;* otherwise, the court will not compel the mortgagor to accept a counter security. *Burgwin v. Richardson*, 203.
6. When, on a bill filed to settle partnership account, the matters in dispute were referred to arbitrators, who made a report that defendant was in debt to complainants, provided defendant was not liable to pay the amount claimed in an attachment against him for a debt due from the firm, and the court, on complainant's motion, decreed in the alternative, pursuing the language of the report of the referees, it was *Held*, that the decree was as *final* as the court intended to make it, the parties being referred to the decision of another court for its final consummation, and that a bill of review would lie to reverse the decree. *McGowan v. Collins*, 420.

EQUITY—*Continued.*

7. A court of equity can afford no relief on a contract or agreement which is uncertain. By this is meant, however, uncertain in its *terms;* for when an agreement to do a thing, either in itself or by reference to any other rule, furnishes the means of ascertaining the thing, or if the thing be not *now* certain, or capable of certainty, yet if a rule be given by which it may hereafter be rendered certain, equity will interfere. *Prater v. Miller*, 628.

8. Equity is not obliged to decree a specific performance wherever damages might be recovered at law, but will judge from all the circumstances whether the agreement is such as ought, in justice to both parties, to be carried into effect. Where, therefore, an agreement is made between A. and B. for the purchase of a large tract of land, a title to be made when B., the purchaser, pays for it, and B. goes into possession and continues for ten or twelve years, and in all that time pays but a very insignificant part of the purchase money, equity will not compel A. to convey to B. a portion of the land equal in value to the money paid by him, especially when laying off this portion of the land must materially impair the value of the residue of the tract. B., the purchaser, is entitled in equity to have the money which he has paid refunded, and is not chargeable with the rents and profits while in possession; because, by the agreement, he was to take possession and plant and build; but he is justly chargeable with interest on the purchase money. *Ibid.*

ESCAPE. *Vide* Sheriff, 6.

EVIDENCE.

1. An inquisition of lunacy, which appeared to have been taken by the coroner and twelve freeholders and returned to the county court, and by it confirmed, and from which it did not appear that the lunatic was present, was offered in evidence to support the plea of *non compos mentis*. *Held*, that having been received by the county court as an inquest, and a guardian having been appointed under it, it was too late to question it as an inquest. *Arrington v. Short*, 71.

2. A., being indebted to B. in the sum of $1,000, conveyed to B. a house and lot to satisfy the debt, and the consideration in the deed is expressed to be $1,000; B. sues A. for the debt. *Held*, that A. may show by parol the condition of the conveyance, for it does not contradict any averment in the deed; it is evidence of the *mode* of payment, and of course does not deny the *fact* of payment. *Robbins v. Love*, 82.

3. In assumpsit by a physician for his services, defendant shall not call witnesses to prove the general character of plaintiff as a physician. *Jeffreys v. Harris*, 105.

4. In an action by a man of color for his freedom, defendant offered in evidence a record to show plaintiff to be a slave, from which it appeared that the proceedings of an inferior court on a *habeas corpus*, pronouncing him free, had been reversed on the ground of want of jurisdiction in the inferior court. To rebut any unfavorable inference from this record the plaintiff was permitted to give in evidence the declarations of one not a party to the record, but who had posses-

EVIDENCE—*Continued.*

sion and claimed title to the plaintiff under the party to the record of reversal at the time the declarations were made. *Free Jack v. Woodruff*, 106.

5. The judgment of discharge of a court of exclusive jurisdiction on the petition of an insolvent, until reversed for error or quashed, is conclusive evidence of the discharge, and its regularity cannot be incidentally questioned. *Jordan v. James*, 110.

6. In case for deceit in the sale of a runaway negro, who was alleged to be unsound, the defense was that the plaintiff knew it before purchasing; and evidence was offered to show that plaintiff's wife had carried food to the negro, who was lurking about plaintiff's farm before the purchase. Such evidence is inadmissible. *Hart v. Newland*, 122.

7. When a document is offered in evidence, purporting to have subscribed thereto the name of a public agent, his signature must be proved. *Yo-na-gus-kee v. Coleman*, 174.

8. A deposition shall not be rejected because it is certified simply that the witness was sworn to the truth of the deposition, without stating that he was sworn to testify the truth, the whole truth, and nothing but the truth. *Wellborn v. Younger*, 205.

9. Where one sold a tract of land and executed a deed containing the usual acknowledgment of the purchase money, and afterwards discovered that a mistake had been made in counting the amount paid, whereby he was prejudiced, he was allowed, in a court of law, to show such mistake by parol evidence, and on the promise of the purchaser to correct mistakes to recover the deficiency, notwithstanding the acknowledgment in his deed. *Smith v. Amis*, 469.

10. One died intestate during the pendency of an ejectment, and his heirs were made parties defendants. *Held*, that the record of the recovery against the *heirs* was evidence of plaintiff's right to recover against the administrator. *Molton v. Mumford*, 490.

11. To entitle a party to give parol evedince of the contents or execution of a will, alleged to have been destroyed, where there is not sufficient evidence to warrant the conclusion of its actual destruction, the party must show that he has made diligent inquiry and search after the will in the place where it would most probably be found if in existence. *Eure v. Pittman*, 364.

12. It is in the province of the court, in the first instance, to say whether there is sufficient proof of the loss or destruction of the paper, or whether sufficient inquiry has been made to let in parol evidence. *Ibid.*

13. Where declarations were offered in evidence as having been made in the presence of a party, and not contradicted by him, and it was also in evidence that the party to be affected by them was partially intoxicated, it was properly left to the jury to ascertain whether the party was not too much intoxicated to hear and understand the statement when made. *S. v. Perkins*, 377.

EVIDENCE—*Continued.*

14. The title of a statute is no part thereof; when, therefore, the State, on an indictment for forgery, produced a certified copy of an act of South Carolina, reciting the title of another act of that State, it was *Held*, that this evidence was not sufficient to establish the present existence of the act referred to; a certified copy of the act itself would be better. *S. v. Welsh*, 403.

15. On the trial of an issue, directed for the purpose of ascertaining whether an absolute deed was obtained by fraud or misrepresentation, the widow of the grantor named therein is a competent witness to prove that the deed was intended to be a mortgage, because whether the deed was absolute or a mortgage, her right of dower was gone *Price v. Joyner*, 418.

16. On a bill filed, alleging that an absolute deed executed by complainant to defendant was executed in pursuance of a contract for the loan of money, and that the land was to be redeemable by the parol contract of the parties; the court, without meaning to contravene the rule which forbids parol evidence to contradict, vary, or add to the terms of a written agreement, will yet hear parol evidence to prove facts and circumstances *dehors* the deed which go to show that the true contract of the parties could not have been for an absolute conveyance; such as that the money paid was not a fair price for the *absolute purchase;* that the vendor kept possession; that an account was stated between the parties, wherein the money advanced was charged as a debt, and interest thereon was stated, etc. *Streator v. Jones*, 423.

17. Parol evidence, according to the general rule, is inadmissible to vary or contradict a contract reduced to writing. By a variety of decisions, ordinary receipts do not appear to be subject to the operation of the rule, because they do not contain evidence of a contract, but of payment in discharge of a contract; but when, in addition to the receipt of money, a condition is annexed upon which alone the party shall become liable to a further payment, it assumes the nature of a contract, and must be governed by the same rules of evidence. *Smith v. Brown*, 580.

Vide Record, 1, 2; Witness, 3, 4.

EXECUTION.

1. An execution not having indorsed thereon the costs in words at length, is yet good as to everything but costs, and must be obeyed accordingly. *Wingate v. Galloway*, 6.

2. By the act of 1803 all executions issued by a justice of the peace must be made returnable within three months, and an officer is not at liberty to return them unexecuted in a shorter time. *Nesbitt v. Ballew*, 57.

3. When a justice of the peace enters a judgment on the back of a warrant, and writes, "Execute and sell according to law," these latter words must be deemed an execution, for the proceedings of magistrates are entitled to a liberal construction in mere matters of form. *Governor v. Bailey*, 463.

EXECUTION—*Continued.*

4. An execution binds property from its *teste*, so that no sale of it after execution issues, is valid against the execution. *Gilkey v. Dickerson*, 293.

5. A justice's execution binds chattels from its *teste*. *Beckerdite v Arnold*, 296.

Vide Record, 2.

EXECUTORS AND ADMINISTRATORS.

1. A purchase from one administrator, when there is more than one, will vest no title in the purchaser; *aliter* of executors. *Gordon v. Finlay*, 239.

2. A trustee cannot become a purchaser at his own sale, and it would seem that no circumstances will justify a departure from this rule. When one administrator purchases a slave of his coadministrator, it is not in strictness a purchase from *himself*, but the purchase vests no title, for duty and interest being in operation in the purchaser, the case comes within the mischief intended to be guarded against by the rule which prohibits trustees from purchasing of themselves. *Ibid.*

3. It is the duty of an executor here to take out letters testamentary in another State for the purpose of suing for a debt due there, if the interest of the estate which he represents requires it; and in determining this latter point, the magnitude of the debt, the distance, and probable expense are to be considered. An omission to do it when necessary amounts to a *devastavit*. *Helme v. Sanders*, 563.

FOOD.

Selling unwholesome provisions, not fit to be eaten by man, is an offense in any one, indictable at the common law. *S. v. Smith*, 378.

FRAUD.

A., being much indebted, absconded. Executions issued against his property at the instance of several creditors. Prior to the sale of the property, C., who was a creditor by bond, received from A. the sum of $300, to be applied in satisfaction of the claim of a judgment creditor, P., whose judgment was $375. C. failed to make the application as directed, but permitted the property levied on to be sold by the sheriff, and became himself the purchaser at the price of $800, and paid off the judgment of P. only, and afterwards conveyed to the lessors of the plaintiff. Between the time of C.'s purchase and the conveyance to plaintiff's lessors the property was sold under the executions of some of the other creditors, and defendants purchased. In an ejectment between the last purchasers and C.'s vendees, it was *Held*, that C.'s conduct was not fraudulent as to the creditors of A., and though in equity A. had a claim against C., and a reconveyance to A.'s creditors might be decreed, yet A.'s equitable lien was not such as was contemplated by the act of 1812, rendering lands held in trust liable to an execution against *cestui que trust;* and at all events, whatever might have been the conduct of C., the purchasers from him were *bona fide* purchasers, without knowledge of or participation in his breach of trust, and should be protected. *Hawkins v. Sneed*, 149.

GRANT.

1. The act of 1793, which gives jurisdiction in regard to vacating grants, does not authorize the courts to interfere with mesne conveyances from one man to another; therefore, a petition to vacate a grant brought against a person in possession by purchase from the original grantee, when such grantee was not before the court, was dismissed with costs. *Terrell v. Logan*, 319.

2. When a defendant has been in possession thirteen years, under a grant which was found by a jury to have been obtained with full knowledge of a prior grant for the same land, the second grant will be vacated, notwithstanding the length of time. The act of limitations has no application in such case. *McRee v. Alexander*, 322.

3. Whether possession under the second grant, for seven years, prior to its being vacated, is a good bar in ejectment, *quære*. *Ibid.*, 322.

Vide Registration, 2.

HONEST DEBTORS.

1. To a *sci. fa.* against bail, it was pleaded that the principal had been taken by a *ca. sa.*, and had availed himself of the act of 1820 for the relief of honest debtors, and had been legally discharged; the plea was held bad on general demurrer, because it did not show the court's jurisdiction in the discharge, nor did it show that it was during the continuance of the act of 1820, nor did it specify distinctly the kind of discharge relied on, which, under a *ca. sa.*, might have been in two modes. It was also held bad because it did not show that the creditor had notice. *Langley v. Lane*, 313.

HOTCHPOT.

Land given to a child by way of advancement shall not be brought into hotchpot upon his claiming a share of the personal estate. *Wilson v. Hightower*, 76.

INDIAN TITLE.

Cherokee Indians in possession of lands within the limits of North Carolina, reserved under the treaties of 1817 and 1819, made by the United States and the Cherokee Nation, are to be considered as purchasers of the land. The exercise of power by the commissioners of the United States is legitimiate; and, moreover, the stipulations in these treaties, having been recognized by several acts of the Legislature of North Carolina passed since, she must be considered as assenting to them. A grant of the land to the Indian in possession is not necessary, for it is not claimed under those laws which point out the manner of acquiring title to vacant lands in this State, and title may be complete in some cases without grant; *e. g.*, the University holds lands escheated under an act of Assembly. *Eu-che-lah v. Welsh*, 155.

INDICTMENT.

1. An indictment for murder, which stated that A. B., late of Bladen County, etc., with force and arms, *in the county aforesaid, etc.*, was held to contain a sufficient description of the place where the murder was alleged to have been committed. *S. v. Lamon*, 178.

INDICTMENT—*Continued.*

2. In capital cases there is no need of a *formal* joining of issue preparatory to trial; the prisoner's plea, and the joining of issue, called the *similiter*, are *ore tenus. S. v. Lamon*, 175.

3. When a prisoner in a capital case has once pleaded, he is bound to abide by the defense he has chosen. The court may, in its discretion, permit him, for instance, to withdraw the plea of not guilty and plead in abatement; but the prisoner cannot claim to do so as matter of right. *Ibid.*

4. If the indictment charges an offense to have been committed on a day which is yet to come, it is as defective as it would be were no day laid. *S. v. Sexton*, 184.

5. Indictments are not within the statutes of jeofails; being found by a grand jury on oath, the court cannot amend them without the concurrence of the grand jury which finds them. *Ibid.*

6. An indictment charging defendant with having in his possession "one pair of dies, upon which were made the likeness, similitude, figure, and resemblances of the sides of a lawful Spanish milled silver dollar, etc., for the purpose of making and counterfeiting money in the likeness and similitude of Spanish milled silver dollars," was held to charge with sufficient certainty the offense designated in the act of 1811, ch. 814, N. R. *S. v. Collins*, 191.

7. An indictment charging that the defendants, with force and arms, at the house of one S. R., situate, etc., did then and there wickedly, maliciously, and mischievously, and to the terror and dismay of the said S. R., fire several guns, is good; no technical words are necessary, but it should appear that such force and violence were used as amount to breach of the peace. All that the law requires in indictments of this kind is that the facts shall be so charged as to show a breach of the peace, and not merely a civil trespass. *S. v. Langford*, 381.

8. It is improper to lay an offense to have been committed *after* the finding the indictment; but if a day certain be laid *before*, the other may be rejected as surplusage. *S. v. Woodman*, 384.

9. In an indictment for stealing a bank note a description as follows is good: "One $20 bank note, on the State Bank of North Carolina, of the value of $20." *S. v. Rout*, 618.

INJUNCTION. *Vide* Equity, 3.

INSOLVENTS.

In proceedings under the act of 1773 for the relief of insolvents, the single fact to be ascertained is honest insolvency; and when this is ascertained, by the mode prescribed either in the first or third section, the consequence as to the debtor is the same; he is entitled to his discharge from the imprisonment of all creditors under the 39th Article of the Constitution. *Jordan v. James*, 110.

Vide Evidence, 5.

INTEREST.

It was the design of the act of 1807, ch. 721, to allow a plaintiff interest on the principal sum recovered from the time judgment is rendered; and the jury must distinguish between principal and interest when the whole sum is assessed in damages; but when the principal and interest are discriminated on the record, or it can be collected from an inspection of it what the principal is, interest shall be calculated on that. *Deloach v. Worke*, 36.

JUDGE'S CHARGE.

1. A party has a right to the opinion of the court distinctly on the law, on the supposition that he has established to the satisfaction of the jury certain facts. *Plummer v. Gheen*, 66.

2. A judge is not bound to charge on all the points in a case; he may be silent if he will, unless called on by one of the parties to express his opinion on a point of law; but when he passes over one point, which is preliminary, to get at another which could not fairly arise until the first is disposed of, it is error. *McCall v. Massey*, 91.

3. A judge is not bound by law to recapitulate all the evidence to the jury in his charge; it is a matter left to his own discretion. If, however, he thinks proper to deliver a charge, he must do so according to the rule laid down in the act of 1796, ch. 52. *S. v. Morris*, 388.

Vide New Trial, 1.

JUDGMENT *Vide* Record, 3.

JURISDICTION.

The act of 1741 punishes an act committed by a slave with whipping and the loss of ears for the first offense, and with death for the second, on an indictment in the county court. The act of 1816 gives to the Superior Court jurisdiction of all offenses the punishment whereof may extend to life; and in its fourth section enacts that a slave convicted of a clergiable felony shall have clergy as a free man. This clause does not give the Superior Court jurisdiction of the offense named in the act of 1741, although it may possibly be the second offense. *S. v. Adam*, 188.

Vide Constitution, 1; Slaves, 4.

JURY.

1. After conviction on an indictment for murder the objection cannot be taken that one of the grand jury which found the bill was also one of the coroner's inquest which sat on the body of the deceased. *S. v. Lamon*, 175.

2. The sheriff summoned as talesmen persons who were not bystanders in the courthouse. *Held*, that the calling them into court was a sufficient summoning; when they came in they were bystanders, and bound to serve. Whether the court could have fined them for non-appearance, *quære*. *Ibid*.

3. An order to the sheriff to summon talesmen need not be made returnable on the same day on which it was issued. *Ibid*.

JURY—*Continued.*

4. The law is silent as to the number of talesmen which a sheriff must summon; it therefore belongs to the court, in its discretion, to determine the number; and should it not do so the sheriff is left to summon such number as he may deem necessary. *Ibid.*

LEVY.

It is not necessary that a sheriff should absolutely touch personal property, or remove it out of defendant's possession, to constitute a levy; but the mere delivery by a defendant of a list of his negroes to the sheriff is no levy; though had the negroes been present, and had the plaintiff signified that he held them bound to answer the execution, and if no opposition was made to the sheriff's possessing himself thereof if he desired it, it would have amounted to a levy. *Gilkey v. Dickerson*, 293.

Vide Dower, 1; Sheriff, 10.

LIMITATIONS.

1. The acknowledgment which will take a case out of the operation of the statute of limitations must be an acknowledgment of a present subsisting debt. *Bank v. Sneed*, 500.

2. When a defendant, in an affidavit for a continuance, stated "that the action was founded on his guaranty, and by the absent witness he expected to prove such laches on the part of the plaintiff as to discharge him from his engagement," it was *Held*, that this was no acknowledgment to take the case out of the statute. *Ibid.*

3. By a strict and literal construction of the act of limitations an infant must bring his or her action within three years after coming of full age, although he or she shall be *covert, non compos*, imprisoned, or beyond sea, before that period arrives. This, however, is not the obvious construction of the act, and a different one has obtained generally in this State since the passage of the act in 1715, and will therefore be adhered to by the courts; so that if an infant female, having a right of action, marry before coming of age, she is not bound to sue within three years after arriving at full age; her coverture protects her. *Davis v. Cooke*, 608.

MAINTENANCE.

1. A. gave to B. an instrument of writing, stating that he had received from B. a deed for land, for which he was to pay B. $50, if he would take that sum before any decision was made as to the title of the land; but if B. would wait until A. could procure a decision, according to law, so that he (A.) would recover the land from the tenant in possession, he then promised to pay him $100. This contract is not subject to the imputation of maintenance, and a recovery may be had thereon. *Nichols v. Bunting*, 86.

2. It is not the nature of the claim purchased, that is, whether assignable or not, but its being a dormant one, and such an one as the possessor would not himself have prosecuted, which gives to the transaction the character of maintenance. *Ibid.*

MALICIOUS PROSECUTION.

1. If a man prosecute another from real guilt, however malicious his motives may be, he is not liable in an action for malicious prosecution; nor is he liable if he prosecute him for apparent guilt arising from circumstances which he honestly believes. *Plummer v. Gheen*, 66.

2. The question of probable cause is compounded of law and fact; whether certain circumstances are true is a question for the jury; whether, being true, they amount to probable cause, is a question of law. *Ibid.*

3. Case for unlawfully suing out an original attachment is to be considered in the same light with an action brought for suing out a writ where nothing is due; and to support the action plaintiff must show malice and the want of probable cause in the defendant. No action lies for *irregularly* suing out an attachment, but for suing it out for the purpose of oppression and wrong. *Williams v. Hunter*, 545.

MERGER. *Vide* Trespass, 1.

MESNE PROFITS. *Vide* Ejectment, 2, 3.

MISTAKE. *Vide* Equity, 1.

MONEY. *Vide* Bank Notes.

MORTGAGE. *Vide* Registration, 3; Equity, 5.

MURDER. *Vide* Indictment, 1, 2, 3; Jury, 1.

NEW TRIAL.

1. When a Superior Court is requested to instruct a jury on a point relative to which no testimony was offered, and declines to do so, it furnishes no ground for a new trial. *Freeman v. Edmunds*, 5.

2. A new trial will sometimes be granted on the ground of surprise in matter of law. *Wellborn v. Younger*, 205.

3. In an action of debt against an executor several pleas were pleaded, and among others a want of assets; and the plaintiff supported all the other issues by proof, but called no one to prove that defendant had assets; defendant made no objection for the want of such proof, and the case went to the jury, who returned a verdict for the plaintiff on all the issues; defendant moved for a new trial, because assets had not been shown, and the court offered him a new trial of *that issue alone*, which he declined. *Held*, that having refused the opportunity offered of redress in the only point on which he had a right to complain, he had no cause of appeal to the Supreme Court. *Clark v. Blount*, 208.

4. Defendants were in court on the argument of the rule for a new trial, and though called on to support the ground taken (a want of assets) by affidavit, declined to do so. *Held*, that they were not entitled to a new trial. *Ibid.*, 208.

5. New trial granted by the Supreme Court for want of a statement of the case by the judge. *Anderson v. Hunt*, 244; *S. v. Bowers*, 376.

NEW TRIAL—*Continued.*

6. It is altogether discretionary with a judge below to receive further testimony after the argument of a case to the jury, and the Supreme Court will not in general disturb the exercise of such discretion; but in a case in which the rejection of further testimony below produced peculiar hardship, and was founded on the authority of a prior case similar in its facts, in which the rule as to discretion was not correctly laid down, and in which it had been held imperative on the judge to reject the testimony, the Supreme Court granted a new trial, because the prior case had prevented the exercise of any judicial discretion in this instance. *Williams v. Everitt*, 308.

NOL. PROS.

1. A warrant issued to apprehend defendant, and on the 5th of October he was bound to appear at December term of the county court. On the 28th of October a bill for the same offense was found against defendant in the Superior Court, and at December term of the county court, defendant appearing, a *nol. pros.* was then entered on the bill found at that term. *Held*, that the defendant was amenable to the indictment in the Superior Court; otherwise a *nol. pros.* would amount to an acquittal. *S. v. McNeill*, 183.

2. The Attorney-General has a discretionary power to enter a *nol. pros.*, for the proper exercise of which he is responsible; the Court will not interfere unless the power be oppressively used. After entering a *nol. pros.*, when a cause is called for trial, he may issue a *capias* returnable to the next term upon the same indictment. *S. v. Thompson*, 613.

NONSUIT. *Vide* Retraxit, 1.

PARTIES.

Whenever it appears on the face of the pleadings that there are other parties to the contract, who are not joined in the action as plaintiffs, it may be demurred to or taken advantage of in arrest of judgment; and if the objection do not appear on the face of the pleading, but is shown in evidence, it is a proper cause for nonsuit on the general issue. *Wilsox v. Hawkins*, 84.

PARTITION.

In a petition for partition the first judgment to be rendered is for the appointment of commissioners, and final judgment is to be rendered on their return. *Medford v. Harrell*, 41.

PENAL STATUTE.

In proceedings under a statute in the nature of penal actions, by warrant before a magistrate, *e. g.*, turning a road, the warrant must refer to the statute in such a manner that defendant may certainly know what he is called to answer. *Worke v. Byers*, 228.

PLEADING. *Vide* Parties, 1.

QUIA TIMET. *Vide* Equity, 4.

RECORD.

1. The Supreme Court cannot, upon a record of the Circuit Court of the United States offered in evidence, inquire into the fact whether the judgment of the Circuit Court was regularly entered up, or whether the proceedings had thereon were regular. *Pigot v. Davis*, 25.

2. An execution when returned becomes part of the record, and a certified copy thereof is evidence. *Ibid.*, 25.

3. When, upon the plea of *nul tiel record*, it appears that no formal judgment was entered upon the record, the court must overlook the objection; as otherwise, owing to the looseness of practice, the proceedings of courts for years back would be overturned. *Deloach v. Worke*, 36.

4. A defendant brought in as bail on a *sci. fa.* pleaded in the county court certain pleas, and a judgment was rendered against him; on appeal to the Superior Court judgment was again rendered against him; and on appeal to the Supreme Court it did not appear on the record how the pleas in the county court had been disposed of by the Superior Court. *Held*, that the judgment of the Superior Court had been improperly rendered. *Nesbitt v. Ballew*, 57.

5. A prisoner removed his trial to an adjacent county, and the record sent with him stated that the grand jury was "duly drawn, sworn, and charged." It is no good objection that the record does not state that the grand jury was drawn from the original panel; for by our law grand juries can be drawn from the list of original *venire* only; nor is it necessary that a record should set forth the *formula* by which a grand jury is constituted. *S. v. Lamon*, 175.

6. The question to be tried on the plea of *nul tiel record* is a question of *fact* to be tried by the court, and not a question of *law*. And when the court below rejected a paper offered as a copy of a record, because the seal attached to it was so indistinct that it could not be recognized as the seal of any court, the Supreme Court, on appeal, has no power to examine the fact as to the indistinctness of the seal; it must take it to be true as stated. *S. v. Isham*, 185; *S. v. Grayton, note*, 187.

7. When a purchaser under the sheriff, in support of his title, produced a mere memorandum from the clerk's docket of the amount of the judgment, dated in 1783, and proved that nothing more could be found among the records connected with the suit it was *Held*, that the entry having been made in a new and frontier county, at the close of the Revolutionary War, might be received as a record, though if the judgment were of recent date it would be otherwise. *Walker v. Greenlee*, 281.

8. When a record states that a court was held before the Hon. J. P. (who is one of the judges of the Superior Courts), without adding that he is one of the judges, it is sufficient. *S. v. Lewis*, 410.

REGISTRATION.

1. A bill of sale not registered within twelve months from the time of execution, if registered afterwards by virtue of an act giving further time for registration, shall not have relation back to defeat a levy

REGISTRATION—*Continued.*

made after the execution of the bill of sale, but at a period when the law giving further time had not been enacted. Such registration, however, is good as to all future transactions. *Scales v. Fewell,* 18.

2. When a grant was made in 1818 and registered, but the certificate did not show at *what time* it was registered, the court will permit the grant to be read, notwithstanding a period intervened between 1818 and 1821 when no law was in force allowing further time for the registration of grants, unless it be shown that some right vested between the time within which the grant should have been registered and the time when the act of 1821, allowing further time, went into operation. *Haughton v. Rascoe,* 21.

3. A mortgage deed, not registered in time, when registered has no relation back to its date, but operates only from the time of registration. It shall not, therefore, avail anything against an execution levied after its date and before its registration. *Tate v. Brittain,* 55.

REMAINDER.

Where slaves were given by deed to A. B. and C. D., to them, their heirs and assigns forever, "immediately after the death of the grantor," reserving the use and profits of the slaves to the grantor during his natural life, and *after his death* to the said A. B. and C. D., it was *Held,* that, as there could not be a limitation of a remainder in a personal chattel upon a precedent estate for life by deed, the deed operated nothing, but left the property in the donor as it was before. *Foscue v. Foscue,* 538.

REMOVAL.

If under the second removal of a cause under the acts of 1821 and 1822, the clerk should transmit the *same papers* which had been sent to his office upon the first removal, and a prisoner should be tried and convicted thereon, it furnishes no ground to arrest the judgment. *S. v. Lewis,* 410.

Vide Record, 5.

RETRAXIT.

When a party plaintiff voluntarily goes into court, and enters on the record that he is *nonsuit,* it is not a nonsuit, but a *retraxit,* and plaintiff cannot appeal thereon. *Worke v. Byers,* 228.

REVIEW. *Vide* Equity, 6.

ROAD.

1. When a party appeals from the decision of the county court laying off a road over his land, and the Superior Court lays it off as the appellant wishes, the appellant shall not pay the cost of the petition. *Harris v. Coltrain,* 312.

2. The design of notice of an intended petition to lay off a road is that the owners of the land may come forward and object; but the act did not intend that the establishment of a necessary road should be impeded for the want of twenty days notice, if before an order is made for laying off the road ample notice is given to the owner. When, therefore, a petition for a new road is filed, and is continued

ROAD—*Continued.*

in court three years, during which time the owner of the land opposes the petition, continues the cause, appeals to the Superior Court, etc., he cannot, after these steps taken by him, object to the want of twenty days notice, for his conduct shows that he has had ample notice. *Little v. May*, 599.

SHERIFF.

1. A sheriff advertised property to be sold on a certain day, and afterwards, recollecting that it was the general election day, made known that he would open the sale for form, and postpone it to the succeeding day; he did so, and in a contest between a bidder of the first and a bidder of the second day is was *Held*, that the sheriff might well postpone the sale, as by the act of 1820 he is permitted to do so, and the reasons for a postponement must, to a certain extent, be judged of by the sheriff. *Pope v. Bradley*, 16.

2. A sheriff's bond, not drawn pursuant to the directions of the act of Assembly, is good as a voluntary bond, and suit may be brought thereon. *Governor v. Witherspoon*, 42.

3. It is the duty of sheriffs to sell lands in that way by which most money will probably be raised. A sale *en masse* of several tracts of lands held under distinct titles, and not lying contiguous, was supported, however, when it did not appear that either the sheriff or purchaser knew the situation of the land. *Wilson v. Twitty*, 44.

4. When a sheriff levied on land and negroes, and left the negroes in defendant's possession, taking a bond for their production on the day of sale, it was *Held*, that, the negroes not being forthcoming, the sheriff might lawfully sell the land. *Ibid.*, 44.

5. A sale by a sheriff *en masse* of tracts of land adjoining each other will be supported. *Thompson v. Hodges*, 51.

6. If a sheriff give his prisoner the keys of the prison, it is an escape, though the prisoner should not go without the walls. *Wilkes v. Slaughter*, 211.

7. When the sheriff returns to a writ of *capias ad respondendum* that the defendant broke custody before he reached the jail, he cannot be proceeded against as *bail;* for sheriffs are not by law compelled to be special bail against their consent, and here the return shows that the sheriff did not mean to be bail. *Hart v. Lanier*, 244.

8. When the condition of a sheriff's bond was in these words, "that he shall well and truly account for and pay into the hands of the county *trustee* for the time being all such sum or sums of money as may be or shall come into his hands or which he ought to collect for the use of the county; and *in all things comply* with the acts of the General Assembly in such case made and provided," it was *Held*, that when the sheriff had received a part of the tax laid for the repairs of public buildings, the condition of his bond was violated upon nonpayment of it to the *treasurer of public buildings*, to whom, by the act of 1808 the sheriff is directed to pay it. *Cameron v. Campbell*, 285.

SHERIFF—*Continued.*

9. When a sheriff levies on realty before personalty, the defendant has perhaps cause of complaint; but as to the plaintiff in the execution, it is no cause of complaint provided he gets his money; nor can he charge the sheriff with a breach of official duty. *Governor v. Carter*, 328.

10. When a sheriff levies on goods sufficient at the time to satisfy an execution, but which before the sale depreciate in value, the sheriff is not bound to make good such depreciation. *Ibid.*, 328.

11. When a sheriff or other officer is charged with breach of duty, his considering the current bank notes of the country as money, and acting upon that basis, without notice to do so by those concerned, is not a breach of duty. *Ibid.*, 328.

12. The law declares it to be a sheriff's duty to execute all process which comes to his hands with the utmost expediton, or as soon after it comes to his hands as the nature of the case will admit. When he takes no step from the 7th of October to the 1st of November, and assigns no reason for it, he is liable. *Lindley v. Armfield*, 548.

SLANDER.

1. In an action for slander in charging the plaintiff with perjury, defendant is not bound, in support of the plea of justification, to produce such evidence as would convict the palintiff if he were on trial for the offense. *Kinkade v. Bradshaw*, 63.

2. Words to be slanderous must be spoken with an intent to slander, and must so be understood by the hearers. *Studdard v. Linville*, 474.

3. A defendant sued for slander, in charging the plaintiff with perjury, attempted to justify by proving that, in a collateral manner, plaintiff had sworn falsely. *Held*, that perjury may be committed in swearing falsely to a collateral matter with intent to prop the testimony on some other point; but such collateral matter must be *material to the point in dispute;* if it be to a point the existence or nonexistence of which cannot affect the question in dispute, it does not tend to prevent the due administration of justice, and, therefore, it is not perjury. *Ibid.*, 474.

4. To counterfeit any writing with a fraudulent intent, whereby another may be prejudiced, is forgery at common law; therefore, when the defendants charged the plaintiff with having forged a letter in his (defendant's) name, containing this clause, "I have to inform you that I have received your money, and want you to come and receive it," an action of slander was held to be maintainable. *Ricks v. Cooper*, 587.

SLAVES.

1. The increase of slaves, born during the life of a legatee for life, belong to the ulterior legatee, who is the absolute owner. *Erwin v. Kilpatrick*, 456.

2. The act of 1794, ch. 406, relative to slaves hiring their own time, had two objects in view: first, to fine the owner, and, second, to abate the nuisance, if it be yet continuing; or, if it be at an end, to pursue the slave and have him hired out. *S. v. Woodman*, 384.

SLAVES—*Continued.*

3. The necessity of proceeding by presentment under the act of 1794 is repealed by Laws 1797, ch. 474, sec. 3. *Ibid.*, 384.

4. The county courts alone can take original cognizance of a common-law grand larceny committed by a slave. If, therefore, a slave who has once had his clergy be indicted in the Superior Court for a grand larceny at common law, the indictment should state that it was the second offense, so as to incur the punishment of death, and that the court might see upon the record that it had jurisdiction. *S. v. Allen*, 614; *S. v. Daniel*, 617.

SPECIFIC PERFORMANCE. *Vide* Equity, 8.

TAXES.

A sale of land by the marshal for taxes, after a legal tender to the marshal by a part owner of all that was due, vests no title in the purchaser. *Franklin v. Terrell*, 283. .

TENANTS IN COMMON.

If one tenant in common of land take the whole profits thereof, the other cannot maintain case for his part. *Chambers v. Chambers*, 237.

TRESPASS.

The merger of a trespass in the felony (when the trespass is a felony) is a doctrine of the English law, founded not in policy but on the king's right by forfeiture; and as forfeiture is not here a consequence of felony, or at any rate, if it be, is never asserted, the doctrine of merger does not apply in this State. *White v. Fort*, 251.

TRUST.

1. It seems that a trust may be created for the benefit of creditors by a deed, of the existence of which they are ignorant, and that their assent to it may be presumed. *Moore v. McDuffy*, 578.
2. Yet when the trust is created expressly on the condition that they shall execute the deed by a certain day, and upon such execution certain obligations are imposed on them, they cannot incur the obligation without a performance of the condition. *Ibid.*, 578.
3. If the creditors never signed the deed, the trust, if it arose at all, was for the benefit of the bargainors, and was such an interest as under the act of 1812, ch. 330, might be reached by execution. *Ibid.*, 578.

Vide Executors and Administrators, 2.

USURY.

A., being in want of money, applied to B., and it was agreed between them that A. should receive from B. the note of one L. which he held, and give to B. therefor a bond payable to S. for the sum due on L.'s note, with 15 per cent. A. gave his bond accordingly to S., by whom it was indorsed to the brother of B., in whose name suit was brought and a judgment recovered, and the money was collected by an execution against A. *Held*, that B. was guilty of usury, and that it is no defense for a lender on usury to say that he acted as another's agent, unless he disclose the agency at the time of contracting. *Wilkes v. Coffield*, 28.

WARRANTY.

1. When words importing a warranty of soundness are inserted in a conveyance of slaves, the court will not consider them as a bare *affirmation*, which does not amount to a warranty, unless it appears in evidence to have been so intended, but will deem them *part of the contract*, as otherwise they would not have been inserted. These words, "all the above-named negroes are sound, healthy, and clear of disease, and slaves for life, and warranted and defended from all manner of claims whatever," contained a warranty of title and a warranty of soundness sufficient to support an action. *Ayers v. Parks*, 59.

2. In some cases an affirmation as to the title of a chattel, when the seller is in possession, is a warranty as to *title;* but as to *soundness*, an affirmation does not amount to a warranty unless it appear on the evidence to have been so intended. *Inge v. Bond*, 101.

WILL.

A *feme sole* makes a will, marries, and survives her husband, the will is good. *Wood v. Bullock*, 298.

WITNESS.

1. Witnesses should swear to their attendance at each term, and the tickets should state the number of days' attendance at each term. *Thompson v. Hodges*, 318.

2. A witness who attends court without a subpœna to him is not entitled to prove his attendance, so as to charge the losing party with the amount of his witness ticket. *Ibid.*, 318.

3. A witness who has been convicted of forgery in Tennessee is incompetent in the courts of North Carolina. *S. v. Candler*, 393.

4. A witness who, some years before, was much in the habit of receiving and paying away notes of a particular bank, and was an attentive observer of such notes, is competent to prove the genuineness or forgery of a note on that bank, although he may never have seen the president and cashier write, and has never received any letters from them. *Ibid.*, 393.

WRIT.

A writ, issuing to one county from the Superior Court of another county, must have the seal of the court from which it issues impressed upon it. *Governor v. McRea*, 226.

This book must
not be taken
from the building